Message Text

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TO AMEMBASSY RABAT IMMEDIATE
INFO SECSTATE WASHDC 6302

UNCLAS SECTION 1 OF 13 THE HAGUE 3592

E.O. 11652: N/A
TAGS: PFOR, PBOR, MO, SS, SP, ICJ
SUBJECT: SPANISH SAHARA: ALGERIAN ICJ PRESENTATION

REF: THE HAGUE 3578

IN ACCORDANCE WITH AMBASSADOR NEUMANN'S REQUEST EMBASSY TRANSMITS FOLLOWING VERBATIM RECORD OF THREE-HOUR ORAL PRESENTATION MADE BEFORE ICJ BY ALGERIAN REP JULY 15. CONCLUDING REMARKS MADE JULY 16 WILL BE CABLED TOMORROW.

BEGIN TEXT:

MR. BEDJAOUI: MR. PRESIDENT AND MEMBERS OF THE COURT, WHEN THE COURT ROSE YESTERDAY I HAD COME TO THE 19TH CENTURY, A TIME WHEN ANY TERRITORY WHICH DID NOT BELONG TO A CIVILIZED STATE WAS CONSIDERED AS A TERRITORY BELONGING TO NO-ONE.

NEEDLESS TO SAY, THE INEGALITARIAN TYPE OF RELATIONSHIP BETWEEN NATIONS WAS MAINTAINED MORE THAN EVER WITHIN THE SYSTEM OF EUROPEAN 19TH-CENTURY IMPERIALISM. THE TERRA NULLIUS THEORY, MORE IMPATIENTLY APPLIED THAN EVER, FOUND SUSTENANCE IN THE APPETITE FOR OCCUPATION-CONQUEST-I AM DELIBERATELY LINKING THOSE TWO EXPRESSIONS-WHILE AT THE SAME TIME THIS APPETITE FED ON THE SAME THEORY IN A CONSTANT PLAY OF INTERREACTIONS. THUS IT WAS FUNDAMENTALY THE SAME EQUATION OF THE WORLD WHICH HELD SWAY, THOUGH WITH A FEW CHANGES IN THE GEOGRAPHI-
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CAL
AREAS OF ITS OPERATION OR, IF YOU WISH, TO KEEP UP THE ALGEBRAIC METAPHOR, WITH SOME CHANGES IN THE UNKNOWS OR THE PARAMETERS OF THE EQUATION.

ON THE ONE HAND, THERE WAS AN INCREASE IN THE NUMBER OF PROTAGONI-
STS
OPERATING THE TERRA NULLIUS THEORY. NO LONGER WAS IT ANCIENT ROME OR
THE THREE OF FOUR COLONIALIST CHRISTIAN STATES OF THE 15TH AND 16TH
CENTURES BUT THE WHOLESET OFEUROPEAN POWERSWHO WERE ACTIVE, AND
THEY CLOSED THEIR RANKS IN AN EXCLUSIVE CLUB WHICHTHEY TREATED AS AN
IMPREGNABLE FORTRESS ACCESS TO WHICH THEY KEPT IN THEIR OWN HANDS BY
THE DEVICE OF NON-RECOGNITION OF OTHER STATES. THEIR BY-LAWS WERE
THE INTERNATIONAL LAW OF EUROPE-YES, THAT WAS THE NAME GIVEN TO IT-
THE INTERNATIONAL LAW OF EUROPE, TO MAKE USE OF THE TITLE OF SUCH
HANDBOOKS AND TREATISESOF THE PERIOD AS THOSE OF HEFFTER OR
F. DE MARTENS.BUT AMONGTHESE ACTIVE PROTAGONISTS THERE AROSE MORE
VIOLENT CLASHES OF INTEREST THAN EVER. SUCH CLASHES ALSO AROSE BETWEEN,

ON THE ONE HAND, THE EUROPEAN STATES AND, ON THE OTHER HAND, THE UNITED

STATES OF AMERICA, WHICH, AFTER HAVING PRACTISED THE POLICY OF
TERRA NULLIUS VIS-A-VIS THE RED INDIANS, APPLIED THE 1823 MONROE
DOCTRINE TO FORESTALL AND PRECLUDE ANY RENEWED EUROPEAN APPROPRIATION
IN THE NEW WORLD ON THE BASIS OF THAT SOME TERRA NULLIUS THEORY.
WE SHALL SEE LATER HOW AT THE BERLIN CONFERENCE OF 1884-1885 THE
UNITED STATES RAISED THE PROBLEM OF THE RECOGNITION OF THE
SOVEREIGNTY OF INDIGENOUS POPULATIONS. SO MUCH,THEN FOR THE
SITUATION VIEWED FROM THE ANGLE OF THE ACTIVE PROTAGONISTS.
VIEWED FROM THE ANGLE OF THE PEOPLES OBLITERATED BY THE COLONIAL
HISTORY OF THE 19TH CENTURY, WE FIRST NOTE THE VASE GEOGRAPHICAL
EXTENT OF THE CONQUEST-OCCUPATION. THIS WAS THEPERIOD OF COLONIALISM
RUN RIOT, IN THE CONTEXT OF AN OLIGARCHIACAL EUROPEAN LAW. THIS
PHENOMENON TOOK ON CONSIDERABLE PROPORTIONS DESPITE THE LIBERATION
OF THE LATIN-AMERICAN CONTINENT AND ITS BEING PROTECTED FROM EUROPEAN
RECOLONIZATION BY THE MONROE DOCTRINE-THOUGH THIS DOCTRINE IN
FACT DID NO MORE THAN CREATE AN EXCLUSIVE UNITED STATES SPHERE OF
INFLUENCE.
WHAT, WHERE THE TERRA NULLIUS THEORY WAS CONCERNED, WAS THE
PRACTICE OF STATES AND THE POSITION OF JURISTS IN THE 19TH CENTURY
AND AT THE BEGINNING OF THE 29TH? THEY MAY BE SUMMARIZED AS FOLLOWS:
ANY TERRITORY WHICH DID NOT BELONG TO A CIVILIZED STATE WAS
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TERRA NULLIUS.
WITH YOUR PERMISSION, MR. PRESIDENT, I FIRST WISHTO CONSIDER THE
PRACTICE OF STATES.
THE COLONIZING STATESREALIZED THAT THE 16TH-CENTURY POSTULATE
OF NOTIONAL OCCUPATION COULD PUT THEIR EXPANSIONIST DESIGNS AT
RISK ON ACCOUNT OF THE CONFLICTS OF INTEREST BETWEEN THEM. HENCE
THEY PROCLAIMED THE INSUFFICIENCY OF PRIOR DISCOVERY AND THE NEED
FOR EFFECTIVE OCCUPATION. THAT IS THE FIRST POINT.
THE EXACERBATED RIVLARY BETWEEN THE COLONIAL POWERS, ESPECIALLY
IN THE LAST QUARTER OF THE 19TH AND AT THE BEGINNING OF THE 20TH
CENTURIES, LED TO WHAT I MIGHT CALL THE OVERHEATING OF THE
TERRA NULLIUS INSTITUTION. IT MECHANISM, ORGINALLY DESIGNED TO
SETTLE CLASHES OF INTEREST BETWEEN COLONIZERS, BECAME IN FACT SO

OVERHEATED AS TO CASUE DISTORTIONS AND NECESSITATE YET ANOTHER
RE-ADAPTATION OF THE THEORY.
THE CASCADEOF FICTIONS I WAS REFERRING TO YESTERDAY HAD RUINED
THE TERRA NULLIUS THEORY AND, INCONSEQUENCE THE PRINCIPLE OF PRIOR
DISCOVERY. THE KING OF SPAIN, IN THE OLD DAYS, HAD TAKEN PSOESSION
OF THE UNIVERSE WITHOUT LEAVING HIS CABINET, BUT, AS IN THIS NEW ERA
OF BOURGEONING CAPITALISM THERE WAS SHARP COMPETITION BETWEEN EUROPEAN

STATES AND THE POINTSOF COLONIAL EXPANISION HAD MULTIPLIED OVER THE
GLOBE, SOVEREIGN RIGHTS HAD TO BE FOUNDED ON SOMETHING OTHER THAN A
TAKING OF POSSESSION IN THE HUSHED ATMOSPHERE OF A ROYAL CABINT. IN
OTHER WORFDS, IT WAS PRIOR DISCOVERY NOT FOLLOWED UP BY EFFECTIVE
OCCUPATIONWHICH WAS GIVING TROUBLE IN THE 19TH CENTURY. THE EXISTENCE
OFCONCURRENT, RIVAL STATE AUTHORITIES WAS PLAINLY GIVING RISE TO THE
FEAR OF CONFRONTATIONS.
IT WAS THEREFORE IN OCCUPATION, AND NO LONGER MERELY IN DISCOVERY
ALONE, THAT THE LEGAL TITLEOPPOSABLE TO THIRD STATES CAME TO BE SOUGHT.

THIS NEW PRACTICE OF STATES,WHICH HAD ALREADY BEEN FORMULATED BY
QUEEN ELIZABETH OF ENGLANDAFTER THE DRAKE INCIDENT I REFERRED TO
YESTERDAY, TOOK ROOT AT THE END OF THE 18TH AND AT THE BEGINNING OF
THE 19TH CENTURY AND CULMINATED IN THE WELL-KNOWN CASE OF THE
FALKLAND ISLANDS WHICH, AS YOU KNOW, HAD INVOLVED A CONFLICT
BETWEEN SPAIN, FRANCE AND ENGLAND IN THE STRATIS OF MAGELLAN.
IN CASE OF CONFLICT, THEREFORE, PRIOR DISCOVERY WAS NO LONGER TO
PREVAIL OVER OCCUPATION, ACRITERION WHICH APPEARED BETTER
ADAPTED TO THE INTERNATIONAL CIRCUMSTANCES OF THE TIME FOR THE PURPOSE
OF
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REGULATING THE RELATIONS OF KEENEST RIVLARY BETWEEN EUROPEAN
NATIONS.

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THE PARTICIPANTS IN THE BERLIN CONFERENCE THEREFORE FRAMED THE RULE OF EFFECTIVENESS, THOUGH IT WAS ONLY TO APPLY TO NEW OCCUPATIONS ON THE COASTS OF AFRICA. ARTICLE 35 OF THE GENERAL ACT OF THE CONFERENCE READS:

"THE SIGNATORY POWERS OF THE PRESENT ACT RECOGNIZE THE OBLIGATION TO ASSURE, IN THE TERRITORIES OCCUPIED BY THEM, UPON THE COASTS OF THE AFRICAN CONTINENT, THE EXISTENCE OF AN AUTHORITY SUFFICIENT TO CAUSE ACQUIRED RIGHTS TO BE RESPECTED AND, THE CASE OCCURRING, THE LIBERTY OF COMMERCE AND OF TRANSIT IN THE CONDITIONS UPON WHICH IT MAY BE STIPULATED". /A.J.I.L., SUPPLEMENT, VOL. 3, 1909, P. 24./

THE PARTICIPANTS IN THE CONFERENCE, IN PARTICULAR FRANCE AND GERMANY, WERE TIRELESS DEFENDERS OF THIS CONCEPT OF EFFECTIVENESS. IN A LETTER OF 8 NOVEMBER 1884 TO BARON DE COURCEL, THE FRENCH AMBASSADOR IN BERLIN, WHO WAS TOREPRESENT FRANCE AT THE CONFERENCE, THE FRENCH MINISTER FOR FOREIGN AFFAIRS, IN GIVING HIS INSTRUCTIONS, WROTE INTER ALIA AS FOLLOWS:

"THERE REMAIN TO BE DETERMINED THE PRINCIPLES WHICH, IN OUR VIEW, SHOULD PREVAIL IN THIS MATTER. ACCORDING TO THE DOCTRINE COMMONLY ADMITTED BY WRITERS, A STATE MAY ACQUIRE MERELY BY TAKING POSSESSION SUZERAINTY OVER TERRITORIES WHICH ARE EITHER UNOCCUPIED OR BELONG TO SAVAGE TRIBES, PROVIDED THAT THIS TAKING OF POSSESSION IS EFFECTIVE, THAT IS TO SAY, ACCOMPANIED OR FOLLOWED BY CERTAIN ACTS EQUIVALENT TO THE BEGINNINGS OF ORGANIZATION. THE MERE FACT OF PLANTING A FLAG, UNCLASSIFIED

STAKES OR EMBLEMS DOES NOT SUFFICE TO CREATE OR SUSTAIN A TITLE TO EXCLUSIVE POSSESSION OF A COUNTRY ANSWERING THE ABOVE DESCRIPTION". (ARCHIVES OF THE FRENCH MINISTRY OF FOREIGN AFFAIRS, MEMOIRES ET DOCUMENTS, AFRICA, VOL. 109, NO. 87).

BISMARCK FOR HIS PART DECLARED AT THE OPENING SITTING OF THE BERLIN CONFERENCE:

"FOR AN OCCUPATION TO BE CONSIDERED EFFECTIVE, IT IS ALSO DESIRABLE THAT THE ACQUIRER SHOULD, WITHIN REASONABLE TIME, DEMONSTRATE BY POSITIVE INSTITUTIONS THE WILL AND POWER TO EXERCISE HIS RIGHTS THERE AND TO DISCHARGE THE DUTIES FLOWING THEREFROM". (PROTOCOL NO. 1 OF 15 NOVEMBER 1884, ARCHIVES OF THE FRENCH MINISTRY OF FOREIGN AFFAIRS, MEMOIRES ET DOCUMENTS, AFRICA, VOL. 108.)

IT IS CLEAR WHY CERTAIN EUROPEAN NATIONS, SUCH AS FRANCE OR GERMANY, EMPHASIXED THE IMPORTANCE OF EFFECTIVENESS. BOTH THESE POWERS HOPED FOR A MAXIMUM INCREASE IN THE NUMBER OF TERRITORIES CONSIDERED AS BELONGING TO NO-ONE AND THEREFORE OPEN TO THEIR ACQUISITION BY OCCUPATION. THE CONDITION OF EFFECTIVENESS HAD THE RESULT, AS IT WERE, OF REDUCING THE NUMBER OF VALID OCCUPATIONS THAT COULD BE CLAIMED BY THE OTHER RIVAL NATIONS. FROM THAT ANGLE, GERMANY WAS EVEN MORE STRONGLY MOTIVATED, FOR IT HAD ARRIVED LATE ON THE COLONIZATION SCENE AND WAS NOT PREPARED TO HAVE ITS RIVALS BRING UP ANY RIGHTS OF SOVEREIGNTY AGAINST IT UNLESS THEY WERE

BACKED UP BY REAL AND EFFECTIVE POSSESSION. HOWEVER, ONCE THE BERLIN CONFERENCE WAS OVER AND GERMANY HAD MOVED UP FROM THE "HAVE-NOTS" TO THE "HAVES", IT WAS TO FIND THE BURDENS OF EFFECTIVE OCCUPATION HEAVY INDEED, AND WOULD ENDEAVOUR TO ESCAPE FROM THEM.

BUT IT WAS OUT OF THE FRYING-PAN INTO THE FIRE, FOR THE EFFECTIVENESS CONDITION PROVED IN FACT TO BE THE SOURCE OF EVEN MORE NUMEROUS CONFLICTS BETWEEN EUROPEAN POWERS. THERE WAS NOTHING MORE AMBIGUOUS IN THIS PERIOD THAN THIS NOTION OF EFFECTIVENESS, WHICH WAS TO BE CIRCUMVENTED BY THE INSTITUTION OF THE PROTECTORATE, WHICH ACCORDING TO THE BERLIN CONFERENCE BESTOWED EXEMPTION FROM THE CONDITION OF EFFECTIVENESS. MOREOVER THE LIMITS OF THE TERRA NULLIUS THEORY WERE THUS SHOWN BY THE EXACERBATION OF RIVALRIES WHICH LED TO THE GRAFTING ONTO THAT THEORY OF SUCH EXCRESCENCES AS THE THEORY OF INDEPENDENCE, THE THEORY OF CONTIGUITY, THE THEORY OF CONTINUITY, THE THEORY OF THE HYDROGRAPHICAL OR OROGRAPHICAL ZONE IN ORDER, FOR EXAMPLE, TO VINDICATE PORTUGAL'S CLAIMS OVER THE WHOLE OF THE CONGO BASIN, THE THEORY OF THE NATURAL LIMTS OF OCCUPATION, THE THEORY OF THE INDEFINITE ZONE OR THE ZONE FROM SEA
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TO SEA, ETC. (CF. FAUCHILLE,
TRAITE DE DROIT INTERNATIONAL, VOL. 1, PART 2, PP. 722 FF.)

THE PURPOSE OF ALL THESE THEORIES WAS TO JUSTIFY THE INCOHERENT PRACTICE OF STATES UNABLE TO MUZZLE THEIR RIVALRIES, AND TO COVER THIS OR THAT PARTICULAR POLITICAL INTEREST, HENCE IN THE FINAL ANALYSIS ACTUALLY TO FLOUT THE IDEA OF EFFECTIVENESS AND, NEEDLESS TO SAY, TO DISREGARD PEOPLES AND OVERTURN THE TERRA NULLIUS THEORY.

THE PROBLEM OF NOTIFICATION PROCEDURE THEN CAME TO THE FORE. THIS IS ANOTHER PROBLEM WHICH MUST BE VIEWED FROM THE ANGLE OF THE COMPETITION BETWEEN THE VARIOUS CIVILIZED NATIONS OF THE 19TH CENTURY.

ACCORDING TO THE TERRA NULLIUS THEORY AS IT HAD EVOLVED IN THE 19TH CENTURY, ANY TERRITORY NOT BELONGING TO A CIVILIZED NATION WAS TERRA NULLIUS. THUS THE REAL ISSUE OF THE AGE WAS MERELY A QUESTION OF SHARING OUT TERRITORIES BETWEEN WESTERN POWERS. IT WAS INDEED IN THOSE TERMS THAT THE QUESTION AROSE AND, DESPITE THE SPEECHES MADE ABOUT THEM AT THE 1885 BERLIN CONFERENCE ON AFRICA, THERE WAS NO QUESTION OF THE VOICE OF THE PEOPLES OF AFRICA BEING HEARD IN THOSE PROCEEDINGS: THEY WERE NOT SUBJECTS OF THE INTERNATIONAL LAW OF THAT TIME, THE ONLY SUBJECTS OF THAT INTER-NATIONAL LAW BEING THE MEMBERS OF THE CLUB OF RECOGNIZED STATES.

THE BERLIN CONFERENCE WAS NECESSAY, AND IT MET TO REGULATE THE RIVAL CLAIMS OF THE GOVERNMENTS OF THE POWERS. THIS EXPLAINS AN INNOVATION INTRODUCED BY THE CONFERENCE, NAMELY THE COMPULSORY NOTIFICATION OF OCCUPATIONS LAID DOWN IN ARTICLE 34 OF THE GENERAL ACT OF BERLIN. AN OCCUPYING STATE HAD OFFICIALLY TO INFORM THE OTHER STATES MEMBERS OF THE CONFERENCE EITHER THAT IT HAD TAKEN POSSESSION OF THIS OR THAT TERRITORY WHICH IT CONSIDERED TO BE TERRA NULLIUS, OR THAT IT HAD ASSUMED THE ROLE OF PROTECTING STATE IN REGARD TO THE COUNTRY IN QUESTION.

THE NOTIFICATION COULD GIVE RISE TO OBJECTIONS - THAT

WAS ITS VERY POINT. THESE COULD ARISE FROM THE CLAIMS OF SOME OTHER
EUROPEAN STATE. THUS CONFLICTS OF INTEREST WERE ALSO BEHIND THE
NOTIFICATION CALUSE. EACH NEW OCCUPATION, ONCE NOTIFIED, HAD
NECESSARILY TO REVEAL THE EXISTENCE EITHER OF A TACIT AGREEMENT OR OF
AN OPEN CONFLICT BETWEEN TWO OR MORE EUROPEAN POWERS. HENCE THE AIM
OF NOTIFICATION - ADMITTEDLY RESTRICTED TO FUTURE OCCUPATIONS OF THE
AFRICAN COASTS - WAS TO PROVOKE THE CONSENT OF STATES.
"FAILING AGREEMENT, THERE IS NO EXCLUSIVE COMPETENCE;
THERE ARE ONLY CONCURRENT, RIVAL COMPETENCES, SPACES WHERE
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INTERNATIONAL LAW DOES NOT FORBID ANY STATE TO PERFORM ANY
ACTS IT THINKS FIT, BUT DOES NOT MAKE OF THIS FACULTY A
LEGAL POWER PROTECTED AGAINST THE INTERFERENCE OF OTHERS".
(A. DECENCIERE-FERRANDIERE, REVUE DE DROIT INTERNATIONAL
ET DE LEGISLATION COMPAREE, 1937, PP. 661 F.)
THE QUESTION WHETHR CHALLENGES COULD ARISE FROM THE VIOLATION
OF THE RIGHTS OF OTHERS, FROM THE VIEWPOINT OF THE RIGHT OF OCCUPIED
PEOPLES, WAS IN FACT RAISED, BUT WAS ANSWERED IN THE NEGATIVE. THIS
COULD ONLY RESULT FROM THE ASSUMPTION THAT THROUGHOUT THIS PERIOD
SUCH PEOPLES WERE MISSING FROM HISTORY.
PRESIDENT MONROE'S FAMOUS MESSAGE OF 2 DECEMBER 1823, WHHEREBY
THE UNITED STATES HAD REFUSED TO RECOGNIZE THE VALIDITY OF NEW
OCCUPATIONS BY EUROPEANS IN THE NEW WORLD, HAD HAD THE PRACTICAL
EFFECT OF PREVENTING THE TERRA NULLIUS THEORY FROM OPERATING IN
AMERICA,
MORE PARTICULARLY LATIN AMERICA, AND THUS PREVENTING THE CUSOM OF
ACQUIRING TERRITORIES BY OCCUPATION FROM BECOMING A GENERAL AND
UNIVERSAL INTERNATIONAL CUSTOM. MOREOVER, AS WE HAVE SEEN, THE
BERLIN CONFERENCE IN THE 19TH CENTURY RESTRICTED ITS SPECIFIF
REGULATION OF THE MATTER TO THE CASE OF THE AFRICAN COASTS. NEVER-
THELESS THE PRACTICE OF THE EUROPEAN STATES HAD EXTENDED TO ASIA;
AND, IN ANY EVENT, IT WAS IN FACT THE WHOLE OF THE "INTER-
NATIONAL" LAW OF THE AGE, EUROPEAN LAW PAR EXCELLENCE, AND NOT
MERELY ONE OF ITS CUSTOMS, WHICH WAS LACKING IN ANY GENERAL OR
UNIERSAL CHARACTER. LET US SEE WHAT POSITIONS WERE TAKEN UP BY
JURISTS AT THE TIME.
THEY ENDEAVOURED IN PART TO JUSTIFY THE 19TH CENTURY PRACTICE OF
CONSIDERING ANY TERRITORY NOT BELONGING TO A CIVILIZED STATE AS
TERRA NULLIUS. ANY "CIVILIZED" STATE, AND ONLY "CIVILIZED" STATES,
COULD FORM PART OF THE "INTERNATIONAL COMMUNITY OF STATES" ORGANIZED
AND RECOGNIZED BY THE EUROPEAN STATES. ACCORDINGLY ANY STATE
WHICH DID NOT FORM PART OF THIS CLOSED CLUB WAS NOT A CIVILIZED STATE
,
AND

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C O R R E C T E D C O P Y (TEXT)

ITS TERRITORY COULD BE MADE THE SUBJECT OF OCCUPATION PROTEC-
TORATE OR THE SPHERE OF INFLUENCE OF A STATE BELONGING TO THE CLUB,
THAT IS TO SAY, IN PRACTICE A EUROPEAN STATE. IN OTHER WORDS, THE
OTHER POLITICAL ENTITIES OF THE WORLD, ON ACCOUNT OF THEIR NOT
BEING ORGANIZED ACCORDING TO THE CANONS OF THE 19TH CENTURY
AND THE MODELS OF EUROPE, MORE PARTICULARLY WHERE THE FORM
OF THE STATE WAS CONCERNED, OF EUROPE, MORE PARTICULARLY WHERE
THE FORM OF THE STATE WAS CONCERNED, WERE NO MORE THAN BARBARIAN
STATES OR NON-STATE ENTITIES TO WHICH THE TERRA NULLIUS THEORY
COULD BE APPLIED.

THE THEORY IN QUESTION, FULFILLING THE ENDOGENOUS FUNCTION TO
WHICH I HAVE REFERRED, AND TO FULFILL WHICH IT HAD BEEN DEVISED
BY THE EUROPEAN STATES, THUS PROVIDED THE YARDSTICK FOR DETERMINING
WHAT WAS TERRA NULLIUS. THE RECOGNITION OF THE EXISTENCE OF A
STATE OUTSIDE EUROPE, AND THE DECISION WHETHER IT CONSTITUTED
A CIVILIZED STATE, WERE MATTERS ENTIRELY UP TO EUROPE, MATTERS
BELONGING TO EUROPE'S SOVEREIGN COMPETENCE, AND HAD NOTHING
WHATEVER TO DO WITH ANY REALITIES SPECIFIC TO THE OVERSEAS
TERRITORY IN QUESTION.

NEEDLESS TO SAY, SUCH DECISIONS DID NOT RESULT FROM ANY INSPECTION
IN LOCO. ANY TERRITORY WHICH DID NOT COME UNDER THE AUTHORITY OF A
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CIVILIZED STATE-I.E., IN CONCRETO, FOR PRACTICAL PURPOSES, ANY
TERRITORY NOT UNDER THE SOVEREIGNTY OF A EUROPEAN STATE-WAS
CONSIDERED
AS TERRA NULLIUS AND DECREED TO BE SUCH. THE YARDSTICK ITSELF WAS
THEREFORE ENDOGENOUS, THAT IS TO SAY AN INTERNAL FEATURE OF THE
EUROPEAN CLUB AND A PIECE WITH EUROPEAN CONCEPTIONS. THUS NO-ONE
OTHER THAN A EUROPEAN STATE COULD CRITICIZE OR AFFECT ITS APPLICATION
IN THE SLIGHTEST.
IT IS MOREOVER TO BE NOTED THAT THE JURISTS OF THE 19TH CENTURY DID
NOT SUCCEED IN DEFINING TERRITORIUM NULLIUS DESPITE THE STAR TREAT-

MENT GIVEN IT BY THE COLONIAL EXPANSIONISM OF THE TIMES. FOR
EXAMPLE, EVEN THE INSTITUTE OF INTERNATIONAL LAW HAD GIVEN UP
THE ATTEMPT TO DEFINE IT. A DRAFT DECLARATION ON "OCCUPATION OF
TERRITORIES" PRESENTED BY MR. DE MARTITZ AT THE INSTITUTE'S 1888
LAUSANNE SESSION CONTAINED THE FOLLOWING DEFINITION:
"I. ANY REGION NOT EFFECTIVELY UNDER THE SOVEREIGNTY OR
PROTECTORATE OF ONE OF THE STATES FORMING THE COMMUNITY OF
JUS GENTIUM, IRRESPECTIVE OF WHETHER THAT REGION IS OR IS NOT
INHABITED, IS CONSIDERED TO BE TERRITORIUM NULLIUS."
THIS WAS ENGELHARDT'S REACTION TO THIS DEFINITION:
"...WHAT EXACTLY WAS THE 'COMMUNITY OF JUS GENTIUM'? ON WHAT
CONDITIONS WAS A STATE TO BE CONSIDERED AS FORMING PART OR NOT
FORMING PART OF THE COMMUNITY OF JUS GENTIUM? WHAT WAS THE POSITION
OF A STATE WHICH, WHILE REJECTING SOME RULES OF INTERNATIONAL
LAW, ACCEPTED MOST OF THEM? (I LEAVE TO ENGELHARDT, WHO WAS
SPEAKING IN THE 19TH CENTURY, THE RESPONSIBILITY FOR HIS
PARTICULARLY SPECIOUS ASSERTION.) WAS MOROCCO PART OF THE
COMMUNITY OF JUS GENTIUM? THE POSITION OF ABYSSINIA OR THE
SULTANATE OF ZANZIBAR WAS SIMILAR TO THAT OF MOROCCO.
OTHER SOCIETIES WERE, DE FACTO, OUTSIDE THE COMMUNITY OF
JUS GENTIUM AND YET CONSTITUTED STATES WORTHY OF RESPECT; SUCH
HAD BEEN THE POSITION OF THE STATES OF AMERICA AT THE TIME OF
THE SPANISH CONQUEST. THERE WERE ALSO SOME WHICH FROM CERTAIN
VIEWPOINTS WERE SAVAGE PEOPLES, WHICH WERE ABSOLUTELY OUTSIDE
THE COMMUNITY OF JUS GENTIUM, BUT WHOSE TERRITORY IT WOULD
NEVERTHELESS BE EXTRAVAGANT TO CONSIDER AS TERRITORIUM NULLIUS.
IT WOULD BE INTERESTING TO KNOW THE POSITION FROM THIS POINT
OF VIEW OF EGBAS, A PEOPLE OF TWO MILLION SOULS LIVING
BETWEEN THE RIVER DAHOMEY AND A TRIBUTARY OF THE NIGER."
(ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, 1888-1889,
PP. 117 F. (EDITION NOUVELLE ABREGEE, VOL II, PP 707 F.).)
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FOLLOWING A SOMEWHAT STORY DEBATE THE INSTITUTE FINALLY ADOPTED
THE DRAFT DECLARATION ON THE OCCUPATION OF TERRITORIES, BUT WITHOUT
ATTEMPTING TO DEFINE TERRA NULLIUS, THE VERY OBJECT OF OCCUPATION.
IN AN ARTICLE WHICH APPEARED IN 1885 IN THE REVUE DE DROIT
INTERNATIONAL, PROFESSOR DE MARTENS, TO WHOM WE HAVE ALREADY
REFERRED, INVEIGHS AGAINST THE PRACTICES OF COLONIZATION, SAYING
THAT MORE OFTEN THAN NOT OCCUPATIONS ARE CARRIED OUT BY THE USE
OF FORCE AND TRICKERY.
YET EVEN HE HAD NOT HESITATED TO WRITE THAT "ONLY LANDS BELONGING
TO NO-ONE (N'APPARTENANT A PERSONNE) AND INHABITED BY BARBAROUS
TRIBES MAY BE OCCUPIED" (F. DE MARTENS, TRAITE DE DROIT INTERNA-
TIONAL, PARIS 1886, VOL I, P 464). IN OTHER WORDS, THE INHABITANTS
ARE "NONE-PERSONS" (OR, "NO-ONE").
A YEAR LATER IN THE SAME REVIEW, ENGELHARDT WAXED LYRICAL IN HIS
VEHEMENT DENUNCIATION OF THE INHUMAN PROCEDURES EMPLOYED IN OCCUPYING
TERRITORIES.
SIMILARLY PAUL FAUCHILLE, AFTER CONDEMING THE "ALLEGEDLY LEGAL
SUBTLETIES" USED TO VINDICATE THE BRUTAL USE OF FORCE BY THE WHITE
NORTH-AMERICANS AGAINST THE REDSKINS, AND SEVERAL EUROPEAN NATIONS

AGAINST THE INHABITANTS OF AFRICA, ADDED THAT "IT IS WITH THE AID
OF PEACEFUL AGREEMENTS THAT EUROPE SHOULD SEEK TO PENETRATE
INHABITED REGIONS NOT YET SUBJECTED TO ITS INFLUENCE" (EMPHASIS
ADDED).
PROFESSOR LE FUR HELD THE SAME VIEW. TO HIS MIND, COLONIZATION WAS
A WORK OF CIVILIZATION ON WHICH THE COMMON GOOD OF MANKIND
DEPENDED, BUT HE ADDED: "THE EXISTENCE OF TERRITORIES BELONGING
TO NO-ONE (SANS MAITRE), I.E., NON-ORGANIZED TERRITORIES, IS
THE FIRST CONDITION OF LAWFUL OCCUPATION (OCCUPATION REGULIERE)"
(LE FUR, PRECIS DE DROIT INTERNATIONAL PUBLIC, PARIS, DALLOZ P 37).
I WOULD ALSO REFER, AND I SUGGEST THAT WE MIGHT BEAR IT IN MIND
FOR WHAT FOLLOWS, TO THE REASONING PUT FORWARD BY CASTONNET DES
FOSSES WITH A VIEW TO DEMONSTRATING FRENCH SOVEREIGNTY OVER
MADAGASCAR. HE DENIES THAT THE REGIME OF THE HOVAS, WHICH WAS
NEVERTHELESS HIGHLY ORGANIZED, CAN BE CONSIDERED TO CONSTITUTE
A STATE ACCORDING TO THE LIGHTS OF THE EUROPEAN 19TH CENTURY
(CASTONNET DES FOSSES. REVUE DE DROIT INTERNATIONAL ET DE LEGIS-
LATION COMPAREE, VOL XVII, P 413). THIS IS TANTAMOUNT TO
THE THEORY OF OCCUPATION FLYING TO THE RESCUE OF THE PROCESS OF
CONQUEST.
BUT FINALLY JURISTS, ANXIOUS TO RESOLVE, ON THE THEORETICAL LEVEL,
THE CONFLICTS AND OPPOSITIONS OF INTEREST BETWEEN EUROPEAN NATIONS
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ARISING OUT OF THE APPLICATION OF THE TERRA NULLIUS CONCEPT, ENDED BY
ASSERTING THAT EFFECTIVE OCCUPATION BESTOWED AN ORIGINAL TITLE OF
SOVEREIGNTY BY TRACING IT BACK TO THE RIGHT OF "FIRST OCCUPANT" SAID
TO BE A PRINCIPLE OF NATURAL LAW POSSESSING UNIVERSAL SCOPE.
IN THIS WAY ROMAN LAW WAS INTRODUCED INTO THE NINETEENTH-CENTURY
THEORY OF INTERNATIONAL LAW BY THE CHANNEL OF NATURAL LAW, AND THE
PROBLEM OF OVERSEAS POSSESSIONS WAS RESOLVED BY ENLISTING THE SUPPORT
OF JUSTINIAN AND GAIUS, THE INSTITUTES, THE DIGEST AND THE PANDECTS.
IN AN ORGY OF PURE SPECULATION, APPEAL WAS MADE TO THE CONCEPTS OF
ANIMUS DOMINI, USUS, FRUCTUS, ABUSUS AND HEAVEN KNOWS WHAT ELSE.
HERE I WOULD BORROW AN EARLY SYNTHESIS OF ALL THIS FROM GASTON JEZE:
"IN CONCLUSION, WE MAY SUMMARIZE THE INTERNATIONAL JURISPRU-
DENCE OF THE NINETEENTH CENTURY ON THE RIGHTS OF BARBAROUS
TRIBES IN TWO PROPOSITIONS.
I. THE THEORY OF THE CIVILIZED POWERS, PROGRESSING IN LINE WITH
THE DOCTRINE OF JURISTS, HAS AFFIRMED ITS ABSOLUTE RESPECT
FOR INDIGENOUS SOVEREIGNTIES.
II. PRACTICE HAS REMAINED MORE OR LESS THE SAME AS IN PAST
CENTURIES, SUBJECT TO THIS DOUBLE AGGRAVATING CIRCUMSTANCE THAT
IT IS HYPOCRITICALLY DISGUISED WITH THE OUTWARD SIGNS OF GREAT
MAGNANIMITY AND NO LONGER HAS THE EXCUSE OF GOOD FAITH AND
RELIGIOUS FANATICISM." (GASTON JEZE, ETUDE THEORIQUE ET PRATIQUE
SUR L'OCCUPATION COMME MODE D'ACQUERIR LES TERRITOIRES EN DROIT
INTERNATIONAL, P 160.)
HOWEVER, THE OPTIMISM SHOWN BY GASTON JEZE IN HIS FIRST POINT,
CONCERNING RECOGNITION OF THE SOVEREIGNTY OF SO-CALLED BARBAROUS
TRIBES, IS SUBJECT TO A STRONG CAVEAT, FIRST ON ACCOUNT OF THE
AMBIGUITY OF DOCTRINE TO WHICH WE DREW ATTENTION A MOMENT AGO, AND

SECONDLY BECAUSE THE TERRA NULLIUS THEORY DID NOT HAVE THE EXOGENOUS FUNCTION OF RESOLVING THE ANTINOMY BETWEEN DOMINANT PEOPLES AND SUBJUGATED PEOPLES, BUT ONLY THE FUNCTION OF REGULATING RELATIONS WITHIN THE INTER-EUROPEAN BALANCE OF POWER INTER SE. WITH YOUR PERMISSION,MR. PRESIDENT, I WOULD LIKE BRIEFLY TO EXAMINE WHETHER AND TO WHAT EXTENT ANY SUCH EXOGENOUS FUNCTION EXISTED.

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WHEN I STATE THAT, AS IS SAID YESTERDAY, THE TERRA NULLIUS THEORY ONLY FULFILLED AN ENDOGENOUS FUNCTION, WHAT I MEAN IS THAT ITS SPONSORS WERE NOT CONCERNED TO FIND ROOM WITHIN ITS GENERAL OUTLINE FOR THE PROBLMEOF THE LEGITIMACY OF COLONIZATION. CREATED WITHIN THE EUROPEAN SYSTEM, BY AND FOR THE NEEDS OF THE EUROPEANS, IT WAS SOLEY DESTINED TO DISCIPLINE THE RELATIONSHIPS OF COLONIZING STATES AMONG THEMSELVES BY A POSITIVE ORDERING OF THEIR INTERNATIONAL LAW AT THE TIME. THE TERRA NULLIUS THEORY POSITED AND RESOLVED PROBLEMS CONCERNING CONCURRENT COMPETENCES AS BETWEEN EUROPEAN STATES, AND CRATED ESSENTIALLY A LEGAL RELATIONSHIP AS BETWEEN COLONIZING STATES.IT NEITHER POSITED, OR STILL LESS DID IT REOLVE, THE ANTINOMY BETWEEN DOMINATING PEOPLES AND SUBJUGATED PEOPLES. THIS OBSERVATION IS IMPORTANT, MR PRESIDENT AND MEMBERS OF THE COURT, FOR WE FIND OUSELVES, WITH THIS QUESTION OF WESTERN SAHARA, CONFRONTED WITH A DECOLONIZATION PROBLEM, AND THE TERR NULLIUS THEORY WHICH, AS I WILL SHOW, HAS NO EXOGENOUS FUNCTION AND DOES NOT RESOLVE THE ANTINOMY, IS QUITE OBVIOUSLY INCAPABLE OF HELPING US TO SOLVE SUCH A PROBLEM OF DECONONIZATION. MORE EXACTLY, IT CAN HELP US TO SOLVE IT ONLY BY REFERRING US TO INTERTEMPORAL LAW, AS WE SHALL SEE IN DUE COURSE, AND BY PROVIDING POINTERS TO THE MOST USEFUL RESPONSE THE COURT MIGHT MAKE IN ITS ADVISORY OPINION TO THE QUESTIONS SUBMITTED TO IT.
THE TERRA NULLIUS CONCEPT, THEN, DID NOT FULFIL ANY EXOGENOUS FUNCTION: THUS WE HAVE SEEN HOW FRANCISCO DE VITORIA, THE OUTRAGED WITNESS OF THE REIFICATION OF PEOPLES, LIFTED UP IN VAIN HIS SOLITARY VOICE, WHICH WAS MOTHERED BY THE CLAMOURS OF THE MARKET-
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PLACE AND BUCCANEERS OF THEHIGH SEAS; THUS WE HAVE ALSO SEEN
HOW, FOLLOWING THAT SAME TRIDITION OF THE SIXTEENTH CENTURY, THE
NINETEENTH CENTURY, THOUGH IT WENT THROUGH THE MOTIONS OF OF
CONCLUDING "GLASS-BEAD" OR "SHODDY-GOODS" TREATIES WITH THEM,
PRETENDED THAT PEOPLES DID NOT EXIST WHEN IT CONJURED AWAY THEIR
SOVEREIGNTY AT THE BERLIN CONFERENCE. IN OTHER WORDS, THE EXISTENCE O
F
SO-CALLED "TREATIES OF CESSION" IS NO EXPLANATION, AS I WILL SHORTLY
DEMONSTRATE.

LET US BRIEFLY CONSIDER THESE TWO POINTS.

FIRST, FRANCISCO DE VITORIA, THE POWERLESS WITNESS OF THE
REIFICATION AND THINGIFICATION OF PEOPLES

AS I HAVE ALREADY STRESSED, THERE WAS A GREAT ETHICAL DIFFERENCE
BETWEEN THE EUOPEAN SIXTEENTH AND NINETEENTH CENTURY AS REGARDS THEIR
SCHEMES FOR HEGEMONY. THE PROBLEM OF THE LEGITIMACY OF COLONIZATION
AS SUCH, I.E., THE PROBLEM OF THE FUTURE OF THE INDIGENOUS PEOPLES,
THEIR SOVEREIGNTY OVER THEIR TERRITOY, WAS IN FACT POSITED IN THE
SIXTEENTH CENTURY, IN A PRODIGIOUS DEBATE WHICH FOR SEVEAL DECADES
DIVIDED JURIST FROM JURIST, THEOLOGIAN FROM THEOLOGIAN, A DEBATE
WHICH THE VIGOROUS THOUGHT OF THE GREAT SPANISH JURIST
FRANCISCO DE VITORIA HAS IMMORTALIZED. IN THE NINETEENTH CENTURY,
ON THE CONTRARY, THE EUORPEAN PEOPLES REFUSED TO ENTER INTO RELATION
WITH THE INDIGENOUS INHABITANTS ON A BASIS OF EQUALITY, EFUSED TO
RECOGNIZE THEIR SOVEREIGNTY AND PURPORTED TO CONFISCATE IT FOR THEIR
OWN BENEFIT.

IT SHOULD THEREFORE NOT BE THOUGHT THAT THE JURISTS OF THE TIME
UNANIMOUSLY PROVIDED REASONS IN SUPPORT BOTH OF PAPAL AUTHORITY IN TH

ALLOCATION OF TERRITORIES AND OF THE METHODS EMPLOYED IN THE NAME OF
THE NECESSARY EVANGELIZATION OF "BARBAROUS PEOPLES".

IT IS NOT, MR PRESIDENT, MY INTENTION HERE TO EXAMINE THE DOCTRINE

OF THESE JURISTS IN DETAIL. SIFFICE IT TO SAY THAT IT WAS DIVIDIDED
AND THAT, WHILE THERE WERE JURISTS ENOUGH TO SUPPLY LEGAL REASONIN
TO UNDERPIN THE SYSTEM OF POSITIVE LAW WHICH I HAVE DESCRIBED,
HONEST MINDS WERE NOT LACKING IN THAT SAME PERIOD TO DENOUNCE THE
RULES OF LAW THUS CLABORATED TO JUSTIFY THE USE OF FORCE.

I WOULD SIMPLY REFER TO THE WORKS OF THE CELEBRATED DOMINICAN
OF VICTORIA AND HIS EFFORTSTO MAINTAIN:

-THAT THE RIGHT OF THE HOLY ROMAN EMPIRE DID NOT EXIST;

-THAT THE RIGHT OF THE POPE DID NOT EXIST;

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-THAT PUNISHMENT OF THOSE WHO REFUSED CONVERSION TO CHRISTIANTY
WAS NOT JUSTIFIED;

-THAT THERE WAS NO JUSTIFICATION FOR DESPOLING UNBELIVERS
OF THEIR LAND IN ORDER TO PUNISH THEM FOR THEIR ALLEGED WICKEDNESS;

-THAT THE SPANIARDS WERE NOT THE MESSENGERS OF GOD;

-THAT BOTH PROPERTY AND SOVEREIGNTY EXISTED AMONG THE RED

INDIANS AND THAT THE TERRITORIES THEY OCCUPIED COULD NOT BE REGARDED AS TERRAE NULLUS;

-FINALLY, A PARTICULARLY DARING PROPOSITION FOR THE AGE, ONE THAT

EVEN SMACKEDOF IRREVERENCE, THAT IF THE FACT OF HAVING DISCOVERED AN INHABITED WORLD GAVE EUROPEANS THE OPTION OF TAKING IT INTO POSSESSION,

THE RED INDIANS WOULD HAVE JUST AS MUCH RIGHT TO EXTEND THEIR SOVEREIGNTY OVER SPANISH OR EUOPEAN LANDS,SHOULD THEY HAPPEN TO DISCOVER THEM;

-THAT, IN SUM, TERRITORIES SUBJECT TO PRE-EXISTING SOVEREIGNTIES, HOWEVER RUDIMENTARY, COULD NOT BE ACQUIRED BY OCCUPATION;

-THAT A CESSIONOF A SOVEREIGNTY PERFORMED BY AN INDEIGENOUS SOVEREIGN IN A CONVENTION LATER RATIFED BY THE MANDATORIES COULD NOT CONSTITUTE AN INVULNERABLE TITLE. IN THE EYES OF FRANCISCO DE VITORIA,

WHO WAS WRITING IN THE 16TH CENTURY, THE IGNORANCE OF THE ASSIGNOR, THE PSYCOLOGICAL DISPORPORTION BETWEEN THE CONTRACTING PARTIES, THE FEAR VITIATING CONSENT, ALL THAT MADE THESE CONVENTIONS WHAT WE WOULD NOWADAYS RIGHTLY CALL UNEQUAL TREATIES, INSTRUMENTS THE VALIDITY OF WHICH VITORIA HAD THE COURAGE TO DENY.

THUS VICTORIA CONCLUDED THAT THE TITLES WHEREBY AMERICA HAD BEEN ACQUIRED AND DOMINATED WERE INVALID IN LAW. BUT AN ENLIGHTENED MIND, HOWEVER PENETRATING AND CONVINCING IT MAY BE,HOWEVER AUDACIOUS EVEN FOR ITS TIME, CANNOT BY STSELF CHANGE THE BASIS OF THE LAW IN FORCE AT THE TIME, THE APPETITE FOR WEALTH AND FOR LAND, AND THE RIGIDLY EXCLUSIVE THEOLOGY OF THE CHRISTIAN PRINCES OF THE PERIOD, COULD NOT BE COMBATED BY THE COURAGEOUS VOICE OF A DOMINICAN WHOE HUMANITARIAN IDEAS ANDLEGA ANALYSES WERE SO MUCH IN ADVANCE OF THEIR TIME. THE HISTORY OF SPANISH AND PORTUGUESE COLONIZATION IN THE 15TH AND 16TH CENTURIES THEREFORE REMAINS ONEOF SUPREME IGNORANCE OF THE PEOPLES, AND OF A BRUTAL BRUSHING ASIDE OF THEIR EAL HUMAN, POLITICAL AND LEGAL EXISTENCE.

NTERNATIONAL LAW DID EXIST AT THAT TIME, IT HAD JUST BEEN BORN. RELATIONSHIPS BETWEEN STATES WERE SLOWLY EMERGING FROM UNCLASSIFIED

SUBMISSION TO PAPAL OR IMPERIAL AUTHOIRTY. BUT THIS PRIOD OF THE BIRTH OF INTERNATIONAL LAW WAS ALSO THAT OF THE FORUMULATION OF ALL THE CLASSICAL TEHSES, IN OTHER WORDS THAT OF THE GREATEST LEGAL FORMALISM, WHICH STILL CONCEALED THE MOST BRUTAL USE OF FORCE. EVEN THE EXISTENCE OF THE PEOPLES THAT THE POWERS OF THE TIME FOUND UNDERFOOT WAS DENIED; THE THEORY WAS NO EXOGENOUS FUNCTION; THE TERRITORIES THAT THEY INHABIT,THEIR TERRITORIES, ARE DECLARED BY THE LAW OF THE
TIME TO BE RES NULLIUS, AND THERE IS NO IMPROVEMENT IN THE 19TH CENTURY,
WHERE THE PEOPLES ARE AGAIN BRUSHED ASIDE-THIS IS WHAT I AM COMING TO NOW.

EACH EPOCH, MR PRESIDENT , MEMBERS OF THE COURT, HAS ITS EXCUSES AND IS METHODS OF CAMOUFLAGE.THUSE THE PURPOSE OF COLONIZATION WAS TO FIGHT THE INFIDELS AND TO CONVERT THEM, WHILE ITS REAL AIM

WAS TO ENSLAVE THEM AND TO EXPLOIT THEIR WEALTH. LATER ON,
THE PURPOSE OF COLONIZATION WAS TO BRING ENLIGHTENEMTN AND
CIVLIZATION AND TO DISTRIBUTE THE BENEFITS THEREOF.

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FROM SUCH POINT OF VIEW, EVERYONE REGARDS EVERYONE ELSE AS A
"SAVAGE", IF THERE IS NO SHARED ETHICAL, POLITICAL, PHILOSOPHICAL
OR RELIGIOUS REFERENCE SYSTEM. IF IT BE DECREED THAT THE TERRITORY
SHOULD BELONG TO THE COLONIAL POWER WHICH ASPIRES TO IT, IT IS
NECESSARY, SOMEHOW OR OTHER, TO DISENTITLE ITS OWN INHABITANTS TO
POSSESSION OR SOVEREIGNTY. THEY MUST BE DECLARED TO BE INCAPABLE OF
LOOKING AFTER IT; AND THE ULTIMATE REFINEMENT IS TO SAY THAT IF THE
"SAVAGES"ARE INCAPABLE OF THE SOVEREIGN MANAGEMENT OF THEIR PUBLIC
AFFAIRS, THIS IS BECAUSE THEY ARE NOT EVEN ABLE TO APPRECIATE WHAT
IS GOOD FOR THEM AND THEIR OWN SALVATION. THEY THUS ACQUIRE THE
LEGAL
STATUS OF INFANTS WHO, ONE DAY, THANKS TO THE COLONIAL POWER, WILL
REACH THE AGE OF REASON AND BECOME RESPONSIBLE CITIZENS.
THREATIES HAVE, OF COURSE, BEEN SIGNED WITH THESE "SAVAGES".
DO THEY PROVE THAT THE HISTORICAL FUNCTION OF TERRA NULLIUS HAD AN
EXOGENOUS APPLICATION? DID IT SETTLE THE PROBLEM OF THE RELATIONS
BETWEEN THE NATIVES AND THE COLONIZING STATE?
IN SPITE OF THE EXISTENCE OF THESE "TREATIES", I THINK NOT.
PARTICULARLY IN THE 19TH CENTURY, A LARGE NUMBER OF AGREEMENTS WERE
SIGNED BETWEEN EUROPEAN AND NATIVES, BUT IT WOULD BE A MISUNDER-
STANDING OF THEIR TRUE NATURE TO THINK THAT THEIR FUNCTION WAS
TO REGULATE THE RELATIONS BETWEEN THE CONTACTING PARTIES, IN OTHER
WORDS, THAT OF RESOLVING THE ANTITHESIS BETWEEN COLONIZING STATES
AND OPPRESSED PEOPLES. IN SPITE OF APPEARANCES, THEIR PURPOSE
WAS NOT TO REGULATE THE RELATIONS BETWEEN THE CONTRACTING PARTIES.
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THE SOLE PURPOSE OF THESE "TREATIES" WAS THAT THEY WERE
OPPOSABLE TO ALL OTHER EUROPEAN STATES, WHICH COULD THEN
NO LONGER CLAIM THE TERRITORY AS TERRA NULLIUS. THE EUROPEAN
STATES, IN THEIR RIVALRY WITH ONE ANOTHER, MADE USE OF THESE
TREATIES AS AMETHOD OF PROVING THEIR OCCUPATION. IN SPITE OF
APPEARANCES, HERE TOO, THE AGREEMENTS SIGNED APPERTAINED TO THE
INTERNAL APPLICATION OF THE THEORY OF TERRA NULLIUS, AND IN NO
WAY TO ANY EXTERNAL APPLICATION THAT IT MIGHT HAVE.
IN SPITE OF THE EFFORTS MADE BY LEGAL WRITERS TO SHOW THAT THESE
AGREEMENTS EXPRESSED THE VALID AGREEMENT OF THE SUBJUGATED POPULATION
THE LATTER COULD NOT REALLY BE REGARDED AS HAVING ALIENATED
SOVEREIGNTY OVER ITS TERRITORY OR THE OWNERSHIP OFITS LAND. THIS IS,
IN ADDITION, ONE OF THE MOST OBVIOUS CONTRADICTIONS IN THE WHOLE
THEORY OF THE OCCUPATION OF TERRITORIES BELONGING TO NO-ONE,
FOR, ON THE ONE HAND, EVERYTHING WAS BASED ON THE POSTULATE THAT THE
PEOPLES OCCUPYING THESE TERRITORIES WERE NOT SOVEREIGN, THEIR
TERRITORIES WERE TERRAE NULLIUS. THIS ASSUMPTION COULD NOT FAIL
TO HAVE THE NATURAL CONSEQUENCE THAT THE AFORESAID PEOPLES AND THEIR
REPRESENTATIVES WER NOT SUBJECTS OF INTERNATIONAL LAW AND COULD NOT
CONCLUDE INTERNATIONAL TREATIES. ON THE OTHER HAND, HOWEVER,
WHEN THAT WAS USEFUL FOR THE PURPOSE IN HAND, THE WESTERN STATES
USED AGAINST ONE ANOTHER THE AGREEMENTS SIGNED BY THE NATIVE
CHIEFS WHICH WERETHEN DESCRIBED, WHEN NECESSARY, AS TREATIES
OF CESSION, ALTHOUGH ONE MIGHT RATHER HAVE CALLED THEM "TRINKET
TREATIES". FOR THAT REASON, THE CONFUSION BETWEEN SOVEREIGNTY
AND OWNERSHIP, ALTHOUGH ALREADY OUT OF DATE AT THE TIME, WAS
CAREFULLY KEPT UP.

YOU WILL ALSO NOTE, ONCE AGAIN, THE CONFUSION BETWEEN THE PROCEDURE
FOR THE CESSION OF TERRITORY AND THAT FOR ITS OCCUPATION,
WHICH SHOULD, HOWEVER, BE APPLICABLE TO TWO DIFFERENT CATEGORIES
OF TERRITORY: THE TERRAE NULLIUS AND THE OTHERS.
EXAMPLES OF THESE SO-CALLED TREATIES OF CESSION ABOUND:
-THE CESSION THAT PORTUGAL INVOKED IN 1890-AND WHICHWAS SAID TO
HAVE BEEN MADE IN THE SEVENTEENTH CENTURY BY A CERTAIN EMPEROR
MONOMATAPA;
-THE TREATIES SIGNED BY FRANCE WITH THE SAKALAVE TRIBES OF THE
MADAGASCAR COAST AND, IN 1835, THE TREATIES SIGNED WITH THE HOVA
KINGS, AND IN PARTICULAR WITH KING RADAMA, AND WHICH FRANCE
RELIED ON AGAINST BRITAIN;
-THE TREATIES WHICH THE INTERNATIONAL AFRICAN ASSOCIATION (AND
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I AM ONLY GIVING A FEW EXAMPLES) SIGNED WITH 480 TRIBAL CHIEFS,
CEDING TO IT THE OWNERSHIP OF IMMENSE TERRITORIES AND WHICH IT
INVOKED IN 1877 (ON THE DUBIOUS PROCEDURES WHEREBY THESE AGREEMENTS
WERE CONCLUDED, SEE G. JEZE, OP CIT., P 146 ET SEQ.);
-THE TREATY CONCLUDED ON 11 DECEMBER 1886 AT GRAND BOUBOURY
BETWEEN THE FRENCH REPUBLIC AND THE REPRESENTATIVE OF THE CHIEF OF
THE BOUBOURY COUNTRY, WHICH FORMED PART OF THE GRAND BASSAM (SEE
ARCHIVES DU MINISTERE FRANCAIS DES AFFAIRES ESTRANGERES, MEMOIRES

ET DOCUMENTS, AFRICA, VOL 83, NO 275);
-THE TREATYCONCLUDED ON 1 APRIL 1884 BETWEEN HENRY STANLEY,
ACTING ON BEHALF OF THE INTERNATIONAL AFRICAN ASSOCIATION
AND THE KINGS AND CHIEFS OF NGOMBI AND MAFELA, IN THE CONGO BASIN,
WHEREBY THE LATTER:
"... THEREFORE CEDE TO THE SAID ASSOCIATION, FREELY, ON THEIR OWN
INITIATIVE FOR ALL TIME, IN THEIR OWN NAME AND IN THE NAME OF
THEIR HEIRS AND SUCCESSORS THE SOVEREIGNTY AND ALL RIGHTS OF
SOVEREIGNTY AND GOVERNMENT OVER THEIR TERRITORIES, IN RETURN
FOR A PIECE OF CLOTH EACH MONTH TO EACH OF THE UNDERSIGNED
CHIEFS IN ADDITION TO THE GIFT OF CLOTH GIVEN TODAY; AND THE
SAID CHIEFS DECLARE THAT THEY ACCEPT THIS GIFT AND THIS MONTHLY
SUBSIDY AS PAYMENT FOR ALL OF THE RIGHTS CEDED TO THE SAID
ASSOCIATION" (SEE STANLEY, CINQ ANNEES AU CONGO, PP 623 AND 624)
(TRANSLATION FROM THE FRENCH BY THE REGISTRY-ORIGINAL NOT
AVAILABLE);
-THE TREATYCONCLUDED ON 25 MARCH 1884 BETWEEN THE FRENCH
REPUBLIC AND NOOBOH, KING OF AKAPLESS, WHO CEDED THE SOVEREIGNTY
OVER HIS TERRITORY IN RETURN FOR AN ANNUAL SUM OF 500 FRANCS CALLED
IN THE TREATY "THE ANNUAL CUSTOM", PAYABLE FROM THE GIFT FUND
OF THE COLONY (SEE ARCHIVES DU MINISTERE FRANCAIS DES AFFAIRES
ETRANGERES, MEMOIRES ET DOCUMENTS, AFRICA, VOL 80, NOS 13
AND 16);
-THE DECLARATION OF 1 DECEMBER 1885 WHEREBY THE CHIEFS OF THE
TERRITORY OF SEKKOM, A DEPENDENCY OF THE KING OF AGOUE, RECOGNIZED
THE FRENCH PROTECTORATE OVER THEIR TERRITORY (SEE ARCHIVES DU
MINISTERE FRANCAIS DES AFFAIRES ETRANGERES, MEMOIRES ET
DOCUMENTS, AFRICA VOL 83, NO 53).
I COULD QUOTE HUNDREDS, OR THOUSANDS, OF WHAT HAVE BEEN CALLED
"TREATIES".
IT IS STRIKING TO NOTE HOW, ON THE EVE OF THE BERLIN CONFERENCE,
THE CHANCELLERIES SUDDENLY REMEMBERED SOME OF THE TITLE THAT
THEY HAD APPEARED TO HAVE COMPLETELY FORGOTTEN, AND HOW CERTAIN
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EUROPEAN STATES HASTENED TO "RATIFY"THEM ON THE EVE OF THAT CON-
FERENCE.
IT SOMETIMES HAPPENED THAT TREATIES WERE SIGNED BECAUSE THOSE
THAT HAD PRECEDED THEM HAD BEEN LOST SIGHT OF. THUS, A TREATY
SIGNED AT GRAND BOUBOURY, ON 11 DECEMBER 1886, LAID DOWN IN ITS
FIRST ARTICLE THAT-
"THE CHIEFS OF BOUBOURY HAVING DECLARED THAT THEY WERE PREVIOUSLY
BOUND TO FRANCE BY TREATIES THE TEXT OF WHICH THEY HAVE LOST,
THE PRESENT CONVENTION SHALL THEREFORE SOLELY REGULATE
THE RELATIONSHIPS BETWEEN THE FRENCH AND THE INHABITANTS OF THE
COUNTRY." (SEE ARCHIVES DUE MINISTERE FRANCAIS DES AFFAIRES
ETRANGERES, MEMOIRES ET DOCUMENTS, VOL 83, NO 275.)
SUPPLEMENTARY TREATIES WERE SOMETIMES USED IN ORDER, IT WAS
CLAIMED, TO CLARIFY THE TERMS OF EARLIER TREATIES. THUS, A
TREATY CONCLUDED ON 19 APRIL 1884 BETWEEN STANLEY, HEAD OF THE
INTERNATIONAL AFRICAN ASSOCIATION, AND THE CHIEFS OF THE
PALLABOLA DISTRICTS, CONTAINED THE FOLLOWING PROVISION IN ITS

FIRST ARTICLE.
"IT IS AGREED BETWEEN THE PARTIES THAT THE WORD 'CESSION
OF TERRITORY' SHALL MEAN, NOT THE ACQUISITION OF THE LAND BY
THE ASSOCIATION, BUT RATHR THE ACQUISITION OF (THE)
SUZERAINTY BY (? OF) THE UNDERSIGNED CHIEFS. (SEE STANLEY,
CINQ ANNEES AU CONGO, P 625)(TRANSLATION FROMTHE FRENCH BY
THE REGISTRY-ORIGINAL NOT AVAILABLE.)
WHAT VALIDITY CAN ONE ATTRIBUTE TO THESE TREATIES?
HAD IT NOT ALREADY BEEN CONCLUDED AT THE SAME PERIOD THAT THESE
PEOPLES HAD NO INTERNATIONAL LEGAL PERSONALITY? THE QUESTION
WAS SO EMBARRASSING THAT THE LAW OF THE PERIOD PREFERRED TO MAIN-
TAIN THAT ACQUISITION OF SOVEREIGNTY WAS THE CONSEQUENCE OF
OCCUPATION, AND NOT OF A TREATY. THUS THE DIFFICULTIES OF THE
DOCTRINE OF THE PERIOD WERE AT THEIR PEAK.
CHARLES SALOMON WAS QUITE CORRECT IN HIS CRITICISM WHEN HE
WROTE, IN THE NINETEENTH CENTURY:
"THE CONCLUSION OF A TREATY IS INCONCEIVABLE HERE, BECAUSE
ONE CANNOT SEE WITH WHOM IT COULD BE CONCLUDED AND WHAT COULD
BE ITS PURPOSE; THE CESSION OF SOVEREIGN RIGHTS BY A GROUP OF
INDIVIDUALS, WHO, BY DEFINITION, DO NOT HAVE ANY, IS
INCOMPREHENSIBLE." (SEE CHARLES SALOMON, OP CIT., P 233.)

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IT SHOULD FINALLY BE NOTED THAT IN MOST CASES THE EUROPEAN
CONTRACTING PARTY HAD NO STATUS WHATSOEVER AS PLENIPOTENTIARY,
BUT WAS OFTEN AN INDIVIDUAL, AN EXPLORER, A MERCHANT, OR THE
REPRESENTATIVE OF A PRIVATE COMMERCIAL COMPANY. IN ADDITION TO ALL
THE DEFECTS OF CONSENT, THE INDIGENOUS PARTY FOUND ITSELF OBLIGAED
TO TRANSFER RIGHTS OF THE NATURE OF WHICH IT APPARENTLY HAD NO
IDEA. THUS THE GERMAN COMPANIES IN EAST AFRICA HAD A CLAUSE
INSERTED WHEREBY THE SULTAN OF ZANZIBAR "TRANSFERRED ALL THOSE
RIGHTS WHICH CONSTITUTE THE CONCEPT OF SOVEREIGNTY AS UNDERSTOOD
BY GERMAN LAW".
THUS THE DEVICES USED BECAME MORE ANDMORE NUMEROUS; AND IT WAS

BELIEVED, OR THE PRETENCE WAS THAT IT WAS BELIVED, THAT THE TREATIES CONCLUDED WITH THE NATIVE CHIEFS EXPRESSED THEIR FREE AND INFORMED WILL.

IN THE WORDS OF A WRITER WHO HAD TAEKN PART IN THE BERLIN CONFERENCE:

"THIS PRACTICE TO SOME EXTENT ENDORSES A PRINCIPLE THAT THE CHRISTIAN NATIONS HAD ALMOST ALWASY IGNORED IN THE 15TH AND 18TH CENTURES, A PRINCIPLE WHEREBY THE NATIVE TRIBES, AS INDEPDNENT STAES (SIC) IN GENERAL HAVE THE RIGHT TOSIGN TREATIES, TO CONSENT TO THE TOTAL OR PARTIAL ABANDONMENT OF THEIR SOVEREIGNTY ....THUS, BY A SERIIES OF CONSISTENT FACTS AND DEEDS, THE FEELING OF HUMAN SOLIDARITY, WHICH CONDEMNS VIOLENCE TOWARDS INFERIOR PEOPLES, EVEN WHEN IT IS CARRIED OUT IN THE NAME OF CIVILIZATION, BECAME MORE STRONGLY ACCENTUATED." (REPORT BY M.E. ENGELHART ON UNCLASSIFIED

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THE PROCEEDINGS OF THE BERLIN CONFERENCE ON AFRICA, 7 MARCH 1885, ARCHIVES FRANCAISES, QUAI D'ORSAY, MEMOIRES ET DOCUMENTS, AFRICA, VOL. 109, NO. 163.)

THIS SOVEREIGNTY OF INDEGENOUS PEOPLES, USEFUL FOR A WHILE IN CONFERRING SOME DEGREE OF VALIDTY ON THE TREATIES OF CESSION AT THE TIME WHEN THEY WERE SIGNED, WAS QUICKLY DISCARDED BY THE BERLIN CONFERENCE ITSELF: THIS IS THE POINT TO WHICH I NOW TURN.

THE PROBLEM OF SOVEREIGNTY OF NATIVES AND THE BERLIN CONFERENCE:

SIR EDWARD MALET, THE BRITISHREPRESENTATIVE AT THE BERLIN CONFERENCE SAID:

"I MUST POINT OUT THAT THE NATIVES ARE NOT REPRESENTEDHERE, BUT THAT THE DECISIONS OF THE CONFERENCE WILL NEVERTHELESS BE OF THE GREATEST IMPORTANCE FOR THEM". (BERLIN CONFERENCE, PROTOCOL NO. 1, CESSION OF 15 NOVEMBER 1884, ARCHIVES FRANCAISES, MINISTERE DES AFFAIRES ETRANGERES, MEMOIRES ET DOCUMENTS, AFRICA, VOL. 108 (TRANSLATION).

THE PERSON, HOWEVER, WHO OPENLY AND PRRSISTENLY RAISED THE PROBLEM OF THE SOVEREIGNTY OF THESE NATIVE PEOPLES WAS THE UNITED STATES
REPRESENTATIVE, MINISTER PLENIPOTENTIARY JOHN A. KASSON, WHO SATED:

"WHILST APPROVING THE TWO PARAGRAPHS OF THIS DECLARATION S A FIRST STEP, WILL DIRECTED THOUGH SHORT, IT IS MY DUTY TO ADD TWO OBSERVATIONS TO THE PROTOCOL:
(1) MODER INTERNATIONAL LAW FOLLOWS CLOSELY A LINE WHICH LEADS TO THE RECOGNITION OF THE RIGHT OFNATIVE TRIBES TO DISPOSE FREELY OF THEMSELVES AND OF THEIR HEREDITARY TERRITORY. IN CONFORMITY WITH THE PRINCIPLE MY GOVERNMENT WOULD GLADLY ADHERE TO A MORE EXTENDED RULE, TO BE BASED ON A PRINCIPLE WHICH SHOULD AIM AT THE VOLUNTARY CONSENT OF THE NATIVES WHOSE COUNTRY IS TAKEN POSSESSION OF, IN ALL CASES WHERE THEY HAD NOT PROVOKED THE AGGRESSION.."

BUT THE BERLIN CONFERENCE ADOPTED A NEGATIVE ATTITUDE; ITS CHAIRMAN POINTED OUT:

"THAT THE FIRST PART OF MR. KASSON'S STATEMENT TOUCHED UPON DELICATE QUESTIONS CONCERNING WHICH A CONFERENCE WAS RELUCTANT TO EXPRESS AN OPINION; IT WOULD BE SUFFICIENT TO REPRODUCE IN

THE PROTOCOL THE VIEWS PUT FORWARD BY THE UNITED STATES
PLENIPOTENTIARY" (BERLIN CONFERENCE, PROTOCOL NO 8, 31 JANUARY 1885,
ARCHIVES FRANCAISES, MINISTERE DES AFFAIRES ETRANGERES, MEMOIRES
ET DOCUMENTS, AFRICA, VOL 108).
SO THEY WENT ON OCCUPYING AND THEY WENT ON CONQUERING, IN OTHER
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WORDS OCCUPATION-CONQUEST, IN THE NAME OF THE MISSION OF CIVILIZATION
;
ANDY STATE (? TERRITORY) THAT DID NOT BELONG TO A CIVILIZED STATE WAS
TERRA NULLIUS.
IN REALITY, THE MISSION OF CIVILIZATION INVOLVED NOTHING MORE
THAN IMPOSING ON CERTAIN PEOPLES THE DOMINATION OF CERTAIN
OTHERS, AND DISUGSING THE EXPROPRIATION OF WHICH THEY WERE THE
VICTIMS. THE RELIGIOUS OBJECTIVE OF THE 16TH CENTRY, THAT OF ENSURING
SALVATION OF THE PEOPLES IN SPITE OF THEMSELVES, AND AT THE EXPENSE
OF THEIR SECULAR WELLBEING, WAS, IT WOULD SEEM, MORE CONSISTENT
THAN THE OBJECTIVE PUT FORWARD TO JUSTIFY THE COLONIAL ADVENTURES
OF THE 19TH CENTURY. EVEN IN THE 19TH CENTURY, ONE WRITER,
CHARLES SALOMON, SAID THIS:
"...IF THE REGLIGOUS IDEA IS ESSENTIALLY ABSOLUTE IN CHARACTER,
THE IDEA OF CIVILIZATION, ON THE CONTRARY, IS VARIABLE AND
RELATIVE: NOBODY COULD SERIOUSLY MAINTAIN THAT THERE IS ONLY ONE
CIVILIZATION AND THAT ALL MEN MUST SHARE IN ITS BENEFITS; MANY
WERE ABLE SINCERELY TO BELIEVE, HOWEVEFR, THAT THERE WAS ONLY ONE
RELIGIOUS FAITH AND THAT IT WAS SO VITAL THAT IT BE SHARED BY ALL
MEN THAT ANY METHOD COULD BE USED TO ACHIEVE THIS END"
(CH. SALOMON, OP CIT., P. 194).
ITS IS IMPORTANT TO NOTE THAT, DURING THE DISCUSSIONS AT THE
BERLIN CONFERENCE, THIS CONCEPT OF A MISSION OF CIVILIZATION WAS, IN
ANY CASE, SERIOUSLY CONSIDERED ONLY ON THE INSTENCE, WHICH WE HAVE
ALREADY MENTIONED, OF KASSON, THE UNITED STATES REPRESENTATIVE.
IN THIS WAY, MR PRESIDENT AND MEMBERS OF THE COURT, THE PEOPPLES
OF THE THIRD WORLD HAD TO BEAR THE BRUNT OFHUMAN CRUELTY. IN
REALIGTY, IT WOULD BE UNNECESSARY TO CONSIDER THE QUESTION FROM
THE POINT OF VIEW OF THE PROBLEM OF CIVILIZATION, BECAUSE EVERYONE
KNOWS, EVERYONE KNEW, THAT IT WAS AN EXCUSE FOR CONQUESTS.
THE FREEDOM OF THE BLACKS WAS SIMPLY SUBORDINATED TO THE COMMERCIAL
NEEDS OF THE WHITE. "OCCUPIED-CONQUERED" AFRICA PLAYED NO PART
IN SHAPING THE DESTINY OF THE WORLD, AND WAS ONE OF THOSE
CONTINENTS IN WHICH HISTORY STOOD STILL. TO USE THE HEGELIAN
IMAGE, IT WAS "THIS LAND OF CHILDREN LYING OUTSIDE THE LIGHT
OF HISTORY".
OF COURSE, THE ARGUMENT WITH REGARD TO CIVLIZATION WAS ALSO
COMPLETELY IRRELEVEANT, BECAUSE THERE IS NO HUMAN GROUP WHICH HAS
NO CIVILIZATION. IT IS IN NO WAY NECESSARY THAT SUCH CIVILIZATION
RSEMBLE THAT OF THE CONQUEROR, FROM WHICH IT MAY BE VERY
DIFFERENT.
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A WRITER WHO IS AN EXPERT IN THE SUBJECT, HAS SAID:
"WHAT COULD GIVE US THE RIGHT TO ASSERT THAT A PARTICULAR GROUP S DESTINED NEVER TO SURPASS ITS PRESENT ACHIEVEMENTS? ANYONE WHO CLAIMS TO PREDICT THE FUTURE WITH CERTAINTY MUST BE COMPLETELY IGNORANT OF WORLD HISTORY." (GEORGES HARDY, LA POLITIQUE COLONIALE ET LE PARTAGE DE LA TERRE AUX XIX ET XX SIECLES, PARIS, ALBIN MICHEL, 1937, P. 123.)
THE SITTING WAS ADJOUNED FROM 11.10 A.M. TO 11:35 A.M.
I SHOULD LIKE, WITH THE PERMISSION OF THE COURT, TO CONTINUE MY ADDRSS BY TURNING TO THE SECOND PART OF IT,WHICH DEALS WITH THE HISTORY OF WESTERN SAHRA. I SHALL NOT DWELL ON THIS AT ANY VERY GREAT LENGHT.
IT MAY BE ASKED HOW, AND IN RELATION TO WHAT CRITERIA,THE QUESTION OF WESTERN SAHARA SHOULD BE EXAMINED IN ODER TO DETERMIN WHETHER, AT THE TIME OF ITS OCCUPATION BY SPAIN, IT WAS OR WAS NOT TERA NULLIUS.
IT IS NOT EASY TO CONSIDER THIS QUESTION THEORETICALLY, SINCE IT IS NECESSARY, INTHE LIGHT OF THE CONCLUSIONS REACHED AT THE END OF THE FIRST PART OF MY ADDRESS,TO TAKE INTO ACCOUNT ITS SPECIAL HISTORICAL AND POLITICAL CONTEXT, TOGETHER WITH THE NTERNATIONAL ASPECTS, ALL OF WHICH TENDS TO INCREASE THE CMPLEXITY OF THE TASK.
MOROCCO AND MAURITANIA, HAVE, AS WAS LOGICAL, MAINTAINED THAT WESTERN SAHARA WAS NOT A TERRA NULLIUS, BUT AN INTEGRAL PART OF THEIR RESPECTIVE TERRITORIES. SPAIN, FOR ITS PART, DOES NOT SEEM TO BE OF THE SAME OPINION, AND, FORM THE IMPRESSIVE VOLUME OF DOUCMENTS THAT IT HAS SUBMITTED TOTHE COURT,IT APPEARS THAT IT BASES IT SBELIEF ON THREE SERIES OF ARGUMENTS WHICH, FROM ITS POINT OF VIEW, SERVE O EMPHASIZE THAT WESTERN SAHARA WAS TERRA NULLIUS: FIRST, THERE ARE THE ASSERTIONS MADE IN THE TREATIES WHICH STATD, ACCORDING TO ITS INTERPRETATION, THAT THSE TERRITORIES WERENEITHER MOROCCAN NOR MAURITANIAN; SECONDLY, IT IS ARGUED THAT IT WAS WELL KNOWN THAT THEY WERE AT ALL TIMES INDPENDENT OF THE MOROCCAN CROWN AND THE MAURITANIAN ENTITY; AND FINALLY, THE THIRD SPANISH ARGUMENT RESTS ON THE VARIOUS ACTS DONE, AND IN PARTICULAR THE VARIOUS AGREEMENTS SIGNED BY VARIOUS LOCAL CHIEFS, WITHOUT THE MAKHZEN BEING EITHER CONSULTED OR INFORMED.
THE SPANISH GOVERNMENT, IN ADDITION TO MAINTAINING THAT WESTERN SAHARA WAS AN INDEPDNENT ENTITY NOT APPERTAINING TO THE SOVEREIGNTY OF EITHER OF THE ABOVE MENTIONED PARTIES, AND ALTHOUGH

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IT DOES NOT MAKE ANY FORMAL STATEMENT AS TO THE NULLIUS CHARACTER OF THAT TERRITORY, NEVERTHELESS PUTS FORWARD ARGUMENTS AND SUBMIT DOCUMENTS WHICH LEAD PRECISELY TO THAT CONCLUSION- UNLESS I AM MISTAKEN.
IN ITS WRITTEN STATEMENT, ONE CAN FIND THE FOLLOWING ON THIS SUBJECT:
"THE CONCEPT OF TERRA NULLIUS SHOULD NOT BE UNDERSTOOD, IN THE LIGHT OF THE DEVELOPMENT OF THE COLONIAL PHENOMENON IN THE PAST, AS THE PURE AND SIMPLE DENIAL OF THE EXISTENCE OF ANY LOCAL AUTHORITY IN TERRITORIES COLONISED BY EUROPEAN POWERS, BUT AS THE EXPRESSION OF A LEGAL REALITY CONSONANT WITH THE INTERNATIONAL LAW IN FORCE BOTH THEN AND NOW: LACK OF PERMANENT AND EFFECTIVE STATE SOVEREIGNTY. FOR THAT REASON THE NULLIUS CHARACTER OF A
TERRITORY IS NOT IN ABSOLUTE TERMS, FOR ALL PURPOSES, AND FROM EVERY POSSIBLE POINT OF VIEW, BUT SOLELY WITH REFERENCE TO STATE SOVEREIGNTY. IT IS, RATHER, THE ABSENCE OF THE EXERCISE OF SOVEREIGN POWER BY ANY STATE SUBJECT TO INTERNATIONAL LAW WHICH BESTOWS A CERTAIN LEGAL STATUS ON THE TERRITORY AND PRODUCES A CONCRETE LEGAL EFFECT, NAMELY THAT THE OCCUPATION OF THE TERRITORY BY A SUBJECT OF THE INTERNATIONAL LEGAL ORDER EFFECTIVELY EXERCISING ITS SOVEREIGN POWER, AND ASSUMING THE CORRESPONDING RESPONSIBILITY, IS TO BE CONSIDERED LAWFUL.".
(WRITTEN STATEMENT OF THE SPANISH GOVERNMENT, P 230, PARA 264 (ENG TR P 116).)
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AMONG THE MANY DOCUMENTS WHICH THE SPANISH GOVERNMENT HAS SUBMITTED TO THE COURT AND WHICH RELATE TO THE FIRST OCCUPATIONS IN THE WESTERN SAHARA, WHICH TOOK PLACE IN THE 15TH CENTRY, IN NOTE THE FOLLOWING IN PARTICULAR:
FIRSTLY, THE BULL INEFFABILIS OF POPE ALEXANDER VI, OF 13 FEBRUARY 1495, WHICH GRANTS TO THE CATHOLIC KINGS OF SPAIN THE INVESTITURE OF THE KINGDOMS OF AFRICA AND WHICH MENTIONS, IN PARTICULAR, THAT IT IS NECESSARY-AND I QUOTE: "TO WORK FOR THE INCREASE OF THE CHRISTIAN RELIGION AND FOR THE SALVATION OF SOULS AND TO REDUCE BARBAROUS PEOPLES SO THAT THEREAFTER THEY MAY BE CONVERTED TO THE FAITH" (INFORMATION AND DOCUMENTS, BOOK II, APP 11 TO ANN 2, P 74 (ENG TR P 31)).
SECONDLY, THE TREATY CONCLUDED AT TORDESSILAS, ON 17 JUNE 1494, BETWEEN SPAIN AND PORTUGAL, CONCERNING THE RIGHTS OF EACH WITH REGARD TO FISHERIES AND NAVIGATION ON THE AFRICAN ATLANTIC COAST, IN PARTICULAR BETWEEN CABO BOJADOR AND THE RIO DE ORO

(INFORMATION AND DOCUMENTS,
APP 10 TO ANN 2).
THE DOCTRINE WEHICH WAS DEVELOPED AT THAT PERIOD FOR CARRYING OUT THE PARTITIION OF THE WORLD AND EMERGES FROM THESE DOCUMENTS THUS ENABLED CERTAIN EUROPEAN COUNTRIES, IN PARTICULAR SPAIN TO BEGIN THE PROCESS OF OCCUPYING WESTERN SAHARA FROM THE 15TH CENTURY ONWARDS, JUSTIFIED INITIALLY BY RELIGIOUS AND COMMERCIAL CONSIDERATIONS.
THIS PROCESS WAS TO CONTINUE DURING THE BEGINNING OF THE 16TH CENTURY FOR THE PURPOSE OF THE IMPLANTATION OF TRADING-STATIONS AND FISHERIES, BUT IT WAS TO TAKE ON A MORE POSITIVE AND MORE FORMAL CHARACTER IN THE 19TH CENTURY THROUGH THE INTERMEDIARY OF EXPLORERS OR COMMERCIAL COMPANIES.
I SHALL DELIBERATELY REFRAIN FROM ENUMERATING, AND EVEN MORE FROM ANALYSING, THE "TREATIES" GIVING TO SPAIN NEW TERRI-TORIAL CONCESSIONS IN WESTERN SAHARA BY EXTENDING ITS TERRI-TORIAL OCCUPATION OR DELIMITING ITS "POSSESSION", OR GIVING IT FREEDOM OF ACTION IN WHAT WERE CALLED THE EUROPEAN SHPERES OF INFLUENCE. THESE TREATIES, WHICH WERE CONCLUDED, IN PARTICULAR, AT THE BEGINNING OF THE 19TH CENTURY, HAVE BEEN ANALYSED IN DEPTH BY THE PARTIES, EACH IN HIS OWN WAY, IN THEIR WRITTEN OR ORAL STATEMENTS.
TO ANALYSE THESE TREATIES WITHOUT BEING CARRIED AWAY BY THE DANGEROUS WHIRLPOOL OF HISTORICAL INTERPRETATIONS, WHERE SOME PEOPLE FIND IT SO DIFFICULT TO BE CERTAIN ABOUT ANYTHING,
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WOULD CALL FOR MORE KNOWLEDGE AND MORE PRUDENCE THAN I POSSESS.
THE SUCCESSIVE OCCUPATIONS OF WESTERN SAHARA BY SPAIN, IN PARTICULAR IN THE 16TH AND 19TH CENTURIES, WERE THE CONSEQUENCE OF POLITICAL, ECONOMIC AND RELIGIOUS CONCERNS.
ALTHOUGH THE SPANISH GOVERNMENT, IN ITS WRITTEN STATEMENT, DOES NOT EXPLICITLY STATE ITS POINT OF VIEW AS TO THE CHARAC-TER OF WESTERN SAHARA AT THE TIME OF ITS OCCUPATION, IT CONSIDERS IT WOULD APPEAR, THAT THIS TERRITORY WAS THEN TERRA NULLIUS, BECAUSE IT DID NOT APPERTAIN TO ANY STATE SOVEREIGN BODY.
IT MUST BE RECOGNIZED, HOWEVER, THAT THE SPANISH GOVERNMENT BASES THIS THEORY IN ITS STATEMENT ON THE ABSENCE OF SOVEREIGNTY IN WESTERN SAHARA AND NOT ON THE OTHER PRINCIPLES ESTABLISHED BY COLONIAL LAW, IN PARTICULAR THAT WHEREBY ANY TERRITORY INHABITED BY SAVAGES OR UNCIVILIZED PEOPLE WAS CONSIDERED AS TERRA NULLIUS.
HOW COULD THE SPANISH GOVERNMENT HAVE CLAIMED THAT THESE TERRITORIES WERE POPULATED BY SAVAGES OR UNCIVILIZED PEOPLE, SINCE IT WAS IN THIS REGION THAT THE DYNASTIES WERE BORN WHICH MADE A VERY IMPORTANT CONTRIBUTION TO HISPANO-MOORISH CIVILIZATION?
NEVERTHELESS ONE MAY WONDER WHETHER THE SPANISH GOVERNMENT'S ATTACHMENT TO THIS CONCEPTION DOES NOT CONTRADICT THE CONCLUSION IT REACHES WHEN IT ENDEAVORS TO PROVE THE VALIDITY OF THE TREATIES CONCLUDED WITH THE LOCAL CHIEFS BY ARGUING, IN PARTICULAR, THAT ITS TREATY-PARTNERS WERE CHIEFS ACTING ON BEHALF OF INDEPENDENT AND ORGANIZED TRIBES, WHICH MADE UP A HOMOGENEOUS ENTITY POSSESSING

A STRUCTURE AND EXERCISING POLITICAL AUTHORITY OVER A DEFINED
TERRITORY.
IT IS CLEAR THAT THE POLITICAL-SOCIAL SYSTEM OF THE SAHARA,
RIO DE ORO AND SAQIAT AL-HAMRA, AT THE TIME OF OCCUPATION OF
THAT TERRITORY BY SPAIN, WAS DISTINGUISHED BY CERTAIN ORIGINAL
FEATURES, TAKING INTO ACCOUNT THE EXTENT OF THE TERRITORY AND
THE PARTICULAR MODE OF LIFE OF ITS INHABITANTS, THE GREAT MAJORITY
OF WHOM WERE NOMADS.
THE SPANISH MILITARY COLUMNS, DESPITE THEIR PENETRATION INTO
THE INTERIOR OF THE SAHARA, WHICH IN ANY EVENT WAS NOT LASTING,
DID NOT SUCCEED IN SUPPRESSING CERTAIN TRIBES SUCH AS THE
REGHEIBAT, WHOSE COURAGE AND PROWESS ARE LEGENDARY.
THE RESISTANCE OF THE POPULATION OF WESTERN SAHARA, WHICH WAS
MANIFEST THROUGHOUT THE CENTURIES, BECAME MORE WIDESPREAD AT
THE END OF THE 19TH CENTURY, UNDER THE INFLUENCE OF
RELIGIOUS CHIEFS.
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AS A RESULT OF ITS PRIVILEGED GEOGRAPHICAL POSITION WESTERN
SAHARA WAS, BEFORE THE DEVELOPMENT OF MODERN MEANS OF TRANSPORT,
AN IDEAL TRANSIT AREA BETWEEN THE NORTH AND THE SOUTH, AND BETWEEN
THE COAST AND THE INTERIOR OF WEST AFRICA, IN PARTICULAR FOR
TRADERS.
A COMMUNITY OF INTERESTS CAME INTO EXISTENCE WHICH, COUPLED WITH
OTHER CONSIDERATIONS, FAVOURED THE ESTABLISHMENT OF SOLID AND
PRIVILEGED TIES BETWEEN THIS TERRITORY AND THE NEIGHBOURING
COUNTRIES.
ON THE RELIGIOUS LEVEL, IT WAS INEVITABLE THAT A COMMUNITY
OF BELIEF WOULD EMERGE THROUGHOUT THE REGION, INASMUCH AS MUSLIMS,
WHEREEVER THEY MAY BE, ALL BELONG TO THE GREAT ISLAMIC COMMUNITY,
AND A FORTIORI WHEN IT IS INHABITANTS OF NEIGHBORING TERRI-
TORIES, WHO.

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EMBRACED ISLAM IN THE SAME HISTORICAL CIRCUMSTANCES, AND WHO HAVE A GENUINE CULTURAL AND LIGUISTIC UNITY, WHO ARE CONCERNED. IT IS FOR THAT REASON THAT I LISTENED WITH ENORMOUS INTEREST TO THE STATEMENTS OF MAURITANIA AND MOROCCO IN THE PRESENT CASE.

THE RELATIONSHIPS BETWEN THE COUNTRIES OF THIS REGION WENT BEYOND THE RELIGIOUS CONTEXT. BECAUSE OF THE DANGERS FOR THEM RESULTING FROM EUROPEAN PENETRATION, IT WASOBVIOUS THAT THEY HAD TO AFFORD EACH OTHER MUTUAL ASSISTANCE, THE CONSEQUENCE OF WHICH WAS MOVEMENTS FROM NORTH TO SOUTH AND VICE-VERSA, MOVEMENTS NOT ONLY OF TROOPS BUT ALSO OF SOVEREIGNS AND LOCAL CHIEFS.

ECONOMIC RELATIONSHIPS WERE ALSOVERY WELL DEVELOPED, AND IN THIS REGION THIS IS EASILY EXPLAINED BY THE INTERDEPENDENCE OF COMMUNICATIONS, AND THE FACT THAT THE ECONOMIES ON EACH SIDE WERE MUTALLY COMPLEMENTARY.

ALL THESE PRIVILEGED RELATIONSHIPS ARE AND WERE THE OUTCOME OF A PEACEFUL AND FRUITFUL RELATIONSHIP BETWEEN NEIGHBOURS, AND THEY WERE OF A SPECIAL CHARACTER.

MR. PRESIDENT THAT IS ALL I WANTED TO SAY ON THIS POINT.

HAVING EXAMINED THE DEFINITION OF TERRA NULLIUS, AND HAVING TOUCHED ON ITS HISTORICAL APPLICATION TO THE CASE OF WESTERN SAHARA, IT NOW REMAINS FOR ME TO ENDEAVOUR TO OUTLINE REPLIES TO THE QUESTIONS SUBMITTED TO THE COURT BY THE GENERAL ASSEMBLY. AT THE HEART OF THIS ENQUIRY, ONE INEVITABLY COMES UP AGAINST A DELICATE PROBLEM OF INTERTEMPORAL LAW, WHICH, WITH YOUR PERMISSION, I SHALL NOW EXAMINE.

IT IS NECESSARY TO CONSIDER HOW LAW CAN INTERPRET THE HISTORY OF WESTERN SAHARA, HOW THE QUESTIONS SUBMITTED TO THE COURT CAN BE INTERPRETED, ANDHOW THIS PROBLEM OF INTERTEMPORALITY OF LAW ARISES.

BEFORE STUDYING THE PROBLEM OF METHOD, AND THE CORRESPONDING PROBLEM OF INTERTEMPORAL LAW, WE MUST FIRST RAISE THE QUESTION OF THE SUBJECT OF THE REQUEST FOR ADVISORY OPINION.

IT IS IN THE SPIRIT OF A SEARCH FOR AN EFFECTIVENESS FOR THE COURT'S OPINION THAT I WOULD LIKE, IN MY TURN, TO CONSIDER WHAT IS NOT THE SUBJECT OF THE REQUEST,AND THEN WHAT THE OBJECT SHOULD BE IN OUR VIEW, AND FINALLY WHAT PRECAUTIONS SHOULD BE TAKEN IN ORDER TO ATTAIN THIS END.

LET US FIRST OF ALL CONSIDER THE PROBLEMS WHICH LIE OUTSIDE THE SUBJECT OF THE REQUEST FOR ADVISORY OPINION. AFTER THE MUTALLY CONTRADICTORY ARGUMENTS WHICH HAVE BEEN ADDRESSED TOTHE COURT, I THINK IT IS NOW POSSIBLE, IN THE SPIRIT WHICH I HAVE JUST MENTIONED, TO SORT OUT THE ARGUMENTS, MANY OF WHICH HAVE BEEN MUTUALLY CONTRADICTORY AND THUS MUTUALLY DESTRUCTIVE. I THINK IT IS POSSIBLE TO SUGGEST THAT:

1) THE REQUEST FOR ADVISORY OPINION OBVIOUSLY SHOULD NOT GIVE RISE TO A LAW-SUIT OVER THE ATTRIBUTION OF TERRITORY;

2) THE ADVISORY OPINION CANNOT AMOUNT TO PASSING JUDGMENT ON THE POLITICAL STEPS WHICH THE GENERAL ASSEMBLY MAY TAKE;

3) THE REQUEST SHOULD NOT IN ANY EVENT BE REDUCED TO A PURELY ACADEMIC DISCUSSION.

LET US CONSIDER THESE THREE POINTS IN TURN.

FIRST OF ALL, IT IS AS WELL NOT TO LOSE SIGHT OF SOMETHING WHICH IS OBVIOUS, A TRUISM, NAMELY THAT THE COURT CONTINUES TO BE AN INTERNATIONAL COURT OF JUSTICE, ALTHOUGH IT IS ITS ADVISORY FUNCTION THAT IS IN QUESTION, AS WAS RECALLED BY THE PERMANENT COURT OF INTERNATIONALJUSTICE IN THE CASE CONCERNING THE STATUS OF EASTER CARELIA (ADVISORY OPINION, 23 JULY 1923, P.C.I.J. SERIES B, NO 5,P. 29). THE PRESENT PROCEEDINGS MUST NOT BE CONFUSED WITH THOSE IN A CONTENTIOUS CASE; IF IT IS NECESSARY TO REPEAT WHAT IS SO OBVIOUS, IT IS BECAUSE AT THE OUTSET OF THE PROCESS THERE WAS AN ATTEMPT, WHICH DID NOT COME TO ANYTHING, DIRECTED TO SETTING IN MOTION CONTENTIOUS PROCEEDINGS, THE ULTIMATE OBJECTIVE OF WHICH WOULD HAVE BEEN A DIFFERENT ONE. ANY RECOLLECTIONS OF THIS ATTEMPT AT CONTENTIOUS PROCEEDINGS WHICH MAY HANG OVER THE WORK OF THE COURT MUST BE SWEPT AWAY. IN PARTICULAR, THERE IS IN OUR OPINION NO QUESTION OF SETTLING, BY WAYOFHISTORICAL UNCLASSIFIED

REPLIES, A LAW-SUIT AS TO THE ATTRIBUTION OF TERRITORY, LEADING TO INDEPENDENCE, PARTITIION, OR ATTACHMENT, OF THE SAHARAN TERRITORY. THIS WOULD BE CONTRARY TO STATUTE AND RULES OF THE COURT WITH REGARD TO THE ADVISORY FUNCTION, WOULD BE A BREACH OF THE FUNDAMENTAL PRINCIPLE OF THE CONSENT OF THE PARTIES IN CONTENTIOUS PROCEEDINGS, AND WOULD ABOVE ALL BE IN CONTRADICTION TO THE POLICYOF THE GENERAL ASSEMBLY ON THIS PROBLEM.

SECONDLY, THE COURT CANNOT, WHEN GIVING AN ADVISORY OPINION, SET ITSELF UP AS A SUPERVISORY ORGAN IN RESPECT OF THE POLICY FOLLOWED BY THE UNITED NATIONS GENERAL ASSEMBLY IN THE FIELD OF DECOLONIZATION. THE COURT'S FIELD OF OPERATION IS THAT OF THE LAW, WHEREAS THE LEVEL OF OPERATION OF THE GENERAL ASSEMBLY IS THAT OF POLICY AND OPPORTUNITY. THESE ARE TWO DOMAINS WHICHMUST REMAIN SEPARATE.

THIRDLY, WHILE TAKING ACCOUNT OF THE HISTORICAL NATURE OF THE QUESTIONS SUBMITTED, THE SUBJECT OF THE REQUEST MUST NONETHELESS NOT BE REDUCED TO A MERE HISTORICAL DISCUSSION; THE COURT HAS BETTER THINGS TO DO THAN CLEAR UP A HISTORICAL CONTROVERSY MERELY FOR THE SATISFACTION OF THE SPECIALISTS. THE COURT HAS IN FACT SHOWN, BY THE EXTREME PRUDENCE IT HAS ALWAYS DISPLAYED IN SUCH A FIELD, THAT IT DOES NOT REGARD ITSELF AS EMPOWERED OR EQUIPPED ITSELF TO EMBARK ON SUCH INVESTIGATIONS, AND THAT IT ONLY HAS RECOURSE TO THE --OFTEN CONFLICTING-- OPINIONS OF EXPERTS WHEN IT IS UNABLE TO DO WITHOUT THEM. IN THIS CONNECTION ONE NEED ONLY MENTION THE CAUTION OF THE COURT WITH REGARD TO THE HISTORICAL ASPECTS OF THE DISCUSSION IN THE MINQUIERS AND ECHRHOS CASE. IT IS THUS CLEAR THAT THE COURT HAS NOT BEEN ACCUSTOMED TO AGREE TO GIVE AN ANSWER TO A HISTORICAL QUESTION SIMPLY TO SATISFY ACADEMIC CURIOSITY. THE OPINION OF THE COURT WILL THEREFORE EITHER SERVE A USEFUL PURPOSE, OR WILL NOT. THE GENERAL ASSEMBLY IS EXPECTING USEFUL ENLIGHTMENT ON A CONTEMPORARY PROBLEM. THE QUESTION OF THE BES

EFFECTIVITY OF THE OPINION IS ONE TO WHICH I SHALL,
WITH YOUR PERMISSION, RETURN LATER.
WHAT THE ARE THE PROBLEMS WHICH ARE APPROPRIATE TO THE SUBJECT
OF THE REQUEST?
AS ONE OF THE RECITALS IN RESOLUTION 3292 (XXIX) RCALLS, THE
GENERAL ASSEMBLY TOOK THE VIEW THAT "DURING THE DISCUSSION A
LEGAL DIFFICULTY AROSE OVER THE STATUS OF THE SAID TERRITORY
AT THE TIME OF ITS COLONIZATION BY SPAIN".

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THE JURISDICTION OF THE COURT APPEARS TO US HERE, CONTRARY TO
THE SPANISH ALLEGATIONS, TO BE APPROPRIATE INASMUCH AS, CEASING
TO CONFUSE ADVISORY JURISDICTION AND CONTENTIOUS JURISDICTION
(PARA. 309 OF THE WRITTEN STATEMENT OF THE SPANISH GOVERNMENT),
THERE IS IN FACT NO NEED FOR THE EXISTENCE OF A DISPUTE FOR THE
COURT TO EXERCISE ITS JUDICIAL FUNCTION.
IF IT IS TRUE THAT THE JUDICIAL PROCESS IS A SYSTEM FOR THE
SATISFACTION OF THE RIGHTS OF THE PARTIES, ON THE OTHER HAND THE
ADVISORY FUNCTION CAN CERTAINLY BE SEEN TO BE A SYSTEM FOR THE
MERE JUDICIAL DECLARATION OF THE LAW. IN THE CASE OF CONTENTIOUS
JURISDICTION, BECAUSE A DISPUTE EXISTS, THE FACT OF STATING THE
LAW SETTLES THAT DISPUTE ITSELF. AND IN THE CASE OF ADVISORY
JURISDICTION, THE LAW IS MADE CLEAR ON THE POINT SUBMITTED, BUT
WITHOUT A DISPUTE BEING SETTLED, FOR THE VERY REASON THAT THERE
IS NO DISPUTE; OTHERWISE THE DISTINCTION BETWEEN THE CONTENTIOUS
FUNCTION AND THE ADVISORY FUNCTION WOULD BE VERY DIFFICULT TO
ESTABLISH.
BY VIRTUE OF ARTICLE 92 OF THE CHARTER, THE COURT, AS THE
PRINCIPAL JUDICIAL ORGAN OF THE UNITED NATIONS, WILL CO-OPERATE
WITHIN THE FRAMEWORK OF ITS JUDICIAL FUNCTIONS IN THE WORK OF
DECOLONIZATION BEING CARRIED OUT BY THE GENERAL ASSEMBLY. THE
INTERVENTION OF THE COURT IN THE PROCESS OF DECOLONIZATION THUS
FITS IN PERFECTLY. THE COURT IS INTERVENING IN A LONG SERIES OF
HOMOGENOUS RECOMMENDATIONS, REMARKABLY UNEQUIVOCAL AS REGARDS

THE END IN VIEW AND UNVARYING IN THE PROCEDURE ADVOCATED.
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IT DOES NOT FALL WITHIN THE COMPETENCE OF THE COURT, AS WE HAVE SAID, TO PRONOUNCE JUDGMENT ON THE POLITICAL END IN VIEW OR ON THE OPPORTUNENESS OF THE STRATEGY OF DECOLONIZATION ADVOCATED BY THE GENERAL ASSEMBLY. THE COURT DELIVERS ITS OPINION ON A QUESTION OF LAW; THAT MEANS THAT, REMAINING WITHIN ITS SPHERE, IT GIVES A DECISION WITHIN THE FRAMEWORK OF THE LAW WHICH HAS BEEN DEVELOPED ON THE SUBJECT, THAT IS TO SAY IN THIS CASE THE LAW OF DECOLONIZATION AS IT NOW APPEARS SOLIDLY ESTABLISHED BY NUMEROUS TEXTS AND IN PARTICULAR BY RESOLUTION 1514 (XV) OF THE GENERAL ASSEMBLY.

THE INTERVENTION OF THE COURT THUS FINDS ITS PLACE HERE IN THE SPECIFIC PROCESS OF AN OPERATION OF DECOLONIZATION OF A NON-SELF-GOVERNING TERRITORY, WHICH PROCEEDS INEVITABLY, BY VIRTUE OF THE SPECIFIC RESOLUTIONS ADOPTED IN THE MATTER, TO SELF-DETERMINATION IN A FORM WHICH IT IS FOR THE GENERAL ASSEMBLY TO SPECIFY.

WHAT PRECAUTIONS SHOULD THEN BE TAKEN TO ENSURE THAT THE PURPOSE OF THE REQUEST IS NOT MISREPRESENTED?

IN ORDER TO REMAIN FAITHFUL TO THE RULES AND TO THE SPIRIT OF ITS ADVISORY FUNCTION, THE COURT SHOULD IN THE FIRST PLACE NOT INTERPRET THE QUESTIONS PUT TO IT AS CONTAINING IN THEMSELVES THEIR OWN ANSWER. IN THE STRICT DISCIPLINE OF ITS ANALYSES, THE COURT IS NOT IN THE HABIT OF GOING BEYOND THE QUESTION PUT TO IT, NOR DOES IT FEEL ENTITLED TO MODIFY THEIR NATURE. BY VIRTUE OF ITS JURISPRUDENCE, REAFFIRMED IN ITS ADVISORY OPINION ON CERTAIN EXPENSES OF THE UNITED NATIONS (I.C.J. REPORTS 1962, P. 155), THE COURT MOREOVER ONLY GIVES ITS OPINIONS ON LEGAL QUESTIONS AND REFUSES TO BE INVOLVED IN A FIELD WHICH IS OBVIOUSLY ONE OF POLITICAL NEGOTIATION BETWEEN THE PARTIES.

FINALLY, AND BECAUSE THE COURT, IN ITS OPINION, INTENDS TO REMAIN AT THE LEVEL OF LEGAL QUESTIONS AND TO REPLY TO THEM ON THE BASIS OF THE INTERNATIONAL LAW IN FORCE, IT CANNOT FORGET THE LEGAL ENVIRONMENT, THE LEGAL FRAMEWORK WITHIN WHICH IT IS NECESSARY TO PLACE THE PROBLEM RAISED WHICH IS ONE OF THE LAW OF DECOLONI-ZATION-LAW WHICH IS BASED ON THE GREAT PRINCIPLE OF SELF-DETERMI-NATION CONTAINED IN RESOLUTION 1514 (XIV), AS WILL BE SEEN LATER.

WHAT IS THE NATURE AND THE INTERPRETATION OF THE QUESTIONS?

WE HAVE SEEN AT LENGTH THE HISTORICAL BACKGROUND OF THE CONCEPT OF TERRA NULLIUS. FROM THAT SURVEY WE SHALL IN A FEW MOMENTS DRAW CERTAIN CONCLUSIONS. BUT IT IS NOT SOLELY BECAUSE OF THE REFERENCE TO THE THEORY OF TERRA NULLIUS THAT THE FIRST QUESTION
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RAISES DELICATE QUESTIONS OF INTERPRETATION.

TO GIVE AS THE CRITICAL DATE THE TIME OF COLONIZATION BY SPAIN IS, IN VIEW OF THE SLOW AND PROGRESSIVE PROCESS OF SPANISH ESTABLISHMENT, TO CONFRONT THE COURT WITH A CHOICE OF DATE.

THE WORDING OF THE SECOND QUESTION IS EQUALLY AMBIGUOUS. WHAT SHOULD BE UNDERSTOOD BY LEGAL TIES, WHEN IT IS A MATTER OF RELATIONS BETWEEN A TERRITORY AND OTHER POLITICAL AUTHORITIES? THE NOTION IS VAGUE, AND MAY BE UNDERSTOOD EITHER BY REFERENCE TO INTERNATIONAL LAW-A TREATY IS A LEGAL TIE-OR IN RELATION TO THE SYSTEMS OF MUNICIPAL LAW CONCERNED AND IN PARTICULAR IN RELATION TO THE CONCEPTS PREVAILING FOR THE POLITICAL ORGANIZATION OF MUSLIM PEOPLES AT A GIVEN TIME (SEE MAURICE FLORY, "LA NOTION DE TERRITOIRE ARABE", ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL, 1957, P. 73).

THE TERM "MAURITANIAN ENTITY" IS CERTAINLY NOT CUSTOMARY IN THE TERMINOLOGY OF INTERNATIONAL LAW. NO DOUBT THE DEBATES IN THE GENERAL ASSEMBLY OF THE UNITED NATIONS SHOULD MAKE IT POSSIBLE TO CLARIFY THE SCOPE OF THAT TERM AND INDICATE WHAT SOCIOLOGICAL RELATIVITY AND POLITICAL STRUCTURE IT COVERS.

AS FOR THE TERM TERRA NULLIUS, WE BELIEVE THAT WE HAVE SHOWN IN SUFFICIENT DETAIL, IN THE COURSE OF OUR LONG ANALYSIS, THAT THE THEORY TO WHICH THAT TERM APPLIES HAS HISTORICALLY FULFILLED A REGULATORY FUNCTION IN THE DISTRIBUTION OF TERRITORIES AS BETWEEN THE IMPERIAL POWERS.

WE OBSERVED, IN PARTICULAR, THAT THE CONCEPT OF TERRA NULLIUS REACHED ITS HEYDAY AT THE TIME OF THE EUROPEAN EXPANSION IN THE 19TH CENTURY, AND THAT IT WAS A MATTER OF FINDING AS MANY TERRITORIES AS POSSIBLE BELONGING TO NO-ONE IN ORDER TO LEAVE THE GREATEST POSSIBLE FIELD FREE FOR EUROPEAN IMPERIALISM. CONSEQUENTLY, AS WE HAVE STRESSED FROM THE OUTSET, THE DISTINCTIONS CAREFULLY ESTABLISHED BY JURISTS BETWEEN THE PROCESS OF "OCCUPATION" IN THE CASE OF TERRITORIES BELONGING TO NO-ONE AND THE PROCESSES OF "CONQUEST", "CESSION", OR "ACQUISITIVE PRESCRIPTION" IN THE CASE OF OTHER TERRITORIES, WERE RUTHLESSLY SET ASIDE BY THE PRACTICE OF STATES, AND APPEARED RIDICULOUSLY UNREAL. THUS TERRITORIES UNDER LOCAL AUTHORITY WERE DECLARED TO BE TERRITORIES BELONGING TO NO-ONE, BY AN EXAGGERATED FORCING OF THE CONCEPT OF TERRA NULLIUS WHICH NO LONGER MEANT ANYTHING. IN PRACTICE THERE WAS AN ASTONISHING CONFUSION BETWEEN, ON THE ONE HAND, THE TECHNIQUE OF OCCUPATION WHICH WAS NO LONGER RESERVED ONLY FOR TERRITORIES BELONGING TO NO-ONE, AND ON THE OTHER, THE PROCESS OF CONQUEST OR CESSION
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WHICH WERE NO LONGER RESERVED ONLY FOR OTHER TERRITORIES. WHAT WAS EVEN WORSE, AT THE BERLIN CONFERENCE THERE WAS CONFUSION BETWEEN PROTECTORATES AND TERRITORIES BELONGING TO NO-ONE, AS THEY BOTH APPEARED SIDE BY SIDE IN ONE AND THE SAME CATEGORY CALLED "NEW OCCUPATIONS" WHICH SHOULD ONLY HAVE INCLUDED TERRITORIES BELONGING TO NO-ONE. FINALLY, IT CAN BE AFFIRMED, AND THAT IS MY CONCLUSION ON THE FIRST PART, THAT TERRITORY BELONGING TO NO-ONE WAS ANY TERRITORY TO WHICH IT WAS DESIRED TO APPLY THAT DESCRIPTION, CONTRARY TO THE AIRY FICTIONS OF THE 19TH CENTURY JURISTS WHO CONTINUED TO MAKE INEFFECTIVE DISTINCTIONS. THIS CONCLUSION IS IMPORTANT IN THAT IT SHOWS UP IN ITS TRUE LIGHT THE FIRST QUESTION, ON TERRA NULLIUS, PUT TO THE COURT.

THE COLONIAL POWERS WISHED TO PRESERVE APPEARANCES BY RECOGNIZING

THE COMPETENCE TO NEGOTIATE OF THE INDIGENOUS PEOPLES WITH WHOM THEY HAD TO DEAL. AT THE END OF THAT CENTURY, AND AT THE BEGINNING OF THE 20TH, THE THEORY OF TERRA NULLIUS AGAIN BECAME OVERLOADED WITH VARIOUS AMBIGUITIES OF WHICH IT PROVED IMPOSSIBLE TO CLEAR IT COMPLETELY.

THE CONSTRAINTS IMPOSED BY THE COMPETING CLAIMS OF THE COLONIZING STATES AND BY THEIR KEEN RIVALRY LED EACH OF THEM TO SEEK A MEANS OF PROVING ITS OCCUPATION WITH WHICH TO CONFRONT THE OTHERS. THEY FOUND THAT IT MEANS IN THE INSTITUTION OF THE AGREEMENT WITH THE INDIGENOUS PRINCE, AN AGREEMENT WHICH OF COURSE DESTROYS THE WHOLE ESSENCE OF TERRA NULLIUS, WHICH IS BASED ON THE LACK OF ANY SOVEREIGNTY AND ANY POWER IN THE TERRITORY CONCERNED. IN ORDER TO JUSTIFY THE VALIDITY OF THE AGREEMENTS CONCLUDED WITH THE INDIGENOUS CHIEFS, ENGELHARDT, WHOM I QUOTE AGAIN, IN THE REPORT TO THE MINISTER FOR FOREIGN AFFAIRS WHICH I HAVE ALREADY MENTIONED, WAS ABLE TO GO SO FAR AS TO CONSIDER THE NATIVE TRIBES AS BEING ORGANIZED IN INDEPENDENT STATES. HE WAS TO WRITE MOREOVER THAT, IN HIS VIEW, THE BERLIN CONFERENCE HAD NOT REGARDED THE INDIGENOUS PEOPLES AS FORMING "PURELY ACCIDENTAL ASSOCIATIONS WITHOUT LEGAL PERSONALITY AND OUTSIDE THE COMMUNITY OF THE LAW OF NATIONS" (ENGELHARDT, "ETUDE SUR LA DECLARATION DE LA CONFERENCE DE BERLIN", REVUE DE DROIT INTERNATIONAL ET DE LEGISLATION COMPAREE, 1886, VOL. XVIII, NOS. 5 AND 6 (SECOND ARTICLE, PP. 572-582)).

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BUT HE WAS TO WRITE, IN THE SAME STUDY, THAT "THE INDIANS AND THE BLACKS OF AFRICA, IN THEIR VARIABLE GROUPINGS, DID NOT FOR THE MOST PART OFFER ANY OF THE CONSTITUENT FEATURES OF LEGAL PERSONALITY".
HE ADDS:
"WOULD IT NOT HAVE APPEARED RIDICULOUS TO TREAT THEM IN ACCORDANCE WITH EQUITY AND JUSTICE...THOSE PEOPLE WHO HAD NO LAW OTHER THAN THAT OF PHYSICAL FORCE? OUGHT ONE TO HAVE SEEN A SEMBLANCE OF A

STATE IN MORE OR LESS ACCIDENTAL ASSOCIATIONS, WITHOUT DEFINED FRONTIERS, WITHOUT STABLE POWER, AND GENERALLY WARRING AMONGST THEMSELVES AND PASSING ALTERNATELY FROM FREEDOM TO SLAVERY?" (IBID., P. 577.)

ONE THUS SEES, MR. PRESIDENT AND MEMBERS OF THE COURT, THE HEIGHT OF CONFUSION AND EXTREME MALAISE WHICH HAD BEEN REACHED.

THE OPAQUENESS AND GRAVITY OF THE AMBIGUITY ARE GREATER THAN EVER. THUS IT IS THE THEORY OF THE OCCUPATION OF TERRITORIES BELONGING TO NO-ONE OR REPUTED AS SUCH WHICH IS TO JUSTIFY THE OCCUPATION OF TERRITORIES RECOGNIZED AS HAVING AN INDIGENOUS SOVEREIGN*

AND THOSE AMBIGUITIES, THOSE SUBTLETIES, THOSE ARTIFICES, ARE CONTAINED IN THE SPANISH POINT OF VIEW SUBMITTED TO THE COURT IN THE PRESENT PROCEEDINGS, WHEN THAT POINT OF VIEW DEFINES, AS I HAVE JUST RECALLED, THE CONCEPT OF TERRA NULLIUS.

UNDER THESE CONDITIONS, HOW SHOULD THE FIRST QUESTION PUT TO THE COURT BE ANSWERED? OF COURSE REFERENCE MUST FIRST BE MADE TO

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THE INTERNATIONAL LAW PREVAILING AT THE TIME. MAX HUBER, IN THE ARBITRAL AWARD WHICH HE RENDERED IN THE ISLAND OF PALMAS CASE, REFERRED TO A BASIC QUESTION OF METHOD. A LEGAL RULE CAN ONLY BE APPRECIATED IN RELATION TO THE CONDITIONS OF THE PERIOD AND IN THE FRAMEWORK OF THE CIRCUMSTANCES OF THE TIME: "A JURIDICAL FACT" HE WROTE, "MUST BE APPRECIATED IN THE LIGHT OF THE LAW CONTEMPORARY WITH IT, AND NOT OF THE LAW IN FORCE AT THE TIME WHEN A DISPUTE IN REGARD TO IT ARISES OR FALLS TO BE SETTLED" (TRANSLATION: QUOTATION UNTRACED).

IF WE ARE TO BE GUIDED BY THAT METHOD, AND IN VIEW OF THE FACT THAT ACCORDING TO A PRIMARY CONCEPT DEAR TO THE JURISTS OF THE 19TH CENTURY TERRA NULLIUS IS TERRITORY WHICH IS NOT ORGANIZED AS A STATE AND NOT CIVILIZED, ONE MIGHT REPLY TO THE FIRST QUESTION PUT TO THE COURT THAT THE SAHARA HAD BEEN CONSIDERED BY ITS SPANISH OCCUPANTS TO BE A TERRA NULLIUS. WHERE THE TERRITORY IS NOT UNDER ANY AUTHORITY CONSTITUTED AS A STATE IN ACCORDANCE WITH THE CANONS STRICTLY IMPOSED BY EUROPEAN LAW, IT IS TERRA NULLIUS.

ONE MAY EVEN SAY THAT THE ANSWER IS CONTAINED IN THE QUESTION ITSELF. IN VIEW OF THE FACT THAT THE RULE APPLICABLE IS CONCEIVED AND STATED ARBITRARILY BY THE VERY PARTY WHO WISHES TO APPLY IT TO HIS PROFIT, THE DIE IS CAST, AND IT IS SUFFICENT TO FIND THAT THE OCCUPATION OF THE SAHARA BY THE SPANIARDS HAS BEEN CARRIED OUT TO HOLD AT THE SAME TIME THAT THE TERRITORY WAS NULLIUS, ACCORDING TO THE CANONS OF THE EUROPE OF THE 19TH CENTURY. IN OTHER WORDS, THAT IS A CLOSED TYPE OF REASONING, A KIND OF CIRCULAR LOGIC SUITED TO THE VERY NATURE OF THE SYSTEM INSTITUTED BY EUROPE IN RESPECT OF TERRITORIES OWNED BY NO-ONE. THE COLONIAL STATE WHICH WISHED TO CONQUER A TERRITORY, IN ORDER TO DO SO FIRST INVENTED FREELY AND ARBITRARILY THE APPROPRIATE JURIDICAL IN-STRUMENT. THAT IS WHAT MY WHOLE ARGUMENT YESTERDAY AND THIS MORNING WAS INTENDED TO SHOW. FROM THE VERY FACT THAT OCCUPATION TOOK PLACE, THAT IS TO SAY FROM THE VERY FACT THAT THE CHOSEN

OBJECTIVE WAS ATTAINED, IT CAN BE DEDUCED THAT THE TERRITORY WAS CONSIDERED TO BE TERRA NULLIUS BY THE EUROPEANS IN ACCORDANCE WITH THEIR LAW OF THE PERIOD.

TAKEN IN ITS 19TH-CENTURY CONTEXT, THE CONCEPT OF TERRA NULLIUS SCORNED THE OWNERS OF THE TERRITORY, AND HAD IT OCCUPIED. THE QUESTION PUT TO THE COURT IS ONE OF THOSE WHICH MIGHT SUITABLY HAVE BEEN PUT TO THE BERLIN CONFERENCE ITSELF, WHICH CARRIED OUT THE DISMEMBERMENT OF AFRICA: ITS PURPOSE WOULD HAVE BEEN TO AS-
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CERTAIN WHAT AUTHORITY SHOULD HAVE BEEN JUDGE OF THE FACT WHETHER A TERRITORY REALLY BELONGED TO NO-ONE, AND WHAT TRIBUNAL, POLITICAL OR OTHER, WOULD HAVE BEEN COMPETENT TO DELIVER AN OPINION ON THE CRITERIA OF TERRA NULLIUS AND JUDGE OF THE RECTITUDE OF THEIR APPLICATION TO A GIVEN TERRITORY. THE ANSWER TO THE QUESTION PUT TO THE COURT WAS UNFORTUNATELY GIVEN IN ADVANCE BY THE BERLIN CONFERENCE AND BY THE PRACTICE OF THE COLONIZING STATES: A TERRITORY OWNED BY NO-ONE, AND THUS OPEN TO OCCUPATION BY ANY EUROPEAN COLONIZING STATE, WAS ANY TERRITORY WHICH THAT SAME STATE DECIDED TO REGARD AS SUCH, WITH THE AGREEMENT OF THE OTHER STATES OF THE EUROPEAN CLUB.

IN OTHER WORDS, THE ANSWER IS, ALAS, CONTAINED IN THE QUESTION ITSELF, ONCE ONE HAS TO INTERPRET THE CONCEPT OF TERRA NULLIUS IN CONFORMITY WITH THE LAW OF THE PERIOD. THAT REMINDS ME THAT IN MY DAY, THE CHILDREN IN THE SMALL NURSERY SCHOOL CLASSES THOUGHT IT WAS FUN TO ASK EACH OTHER QUESTIONS WHICH CONTAINED THEIR OWN ANSWER, SUCH AS, FOR INSTANCE: "WHAT COLOUR WAS THE WHITE HORSE OF HENRY?" EXCEPT FOR THOSE WHO FOUND THAT THE QUESTION WAS TOO EASY NOT TO CONTAIN SOME HIDDEN TRAP, THE HORSE COULD ONLY BE WHITE.

THE FACT MUST THEREFORE BE CLEARLY REALIZED. I HAVE PLACED MUCH EMPHASIS ON THE EXCLUSIVELY ENDOGENOUS, AND IN NO WAY EXOGENOUS, FUNCTION OF THE THEORY OF RES NULLIUS, WHICH MEANS THAT THE MASTERS OF THE GAME, FOR DETERMINING THE RULES AND FOR JUDGING CRITERIA AND THEIR APPLICABILITY TO A TERRITORY, WERE EXCLUSIVELY THE COLONIZING STATES, FROM WHOM THERE WAS NO APPEAL NOR ANY RECOURSE WHATSOEVER. IT IS ENOUGH FOR WESTERN SAHARA TO HAVE BEEN COLONIZED FOR ONE TO BE OBLIGED, IN VIEW OF WHAT I HAVE JUST SAID, TO INFER INEVITABLY THAT SPAIN AND EUROPE HAD CON-
SIDERED IT TO BE TERRA NULLIUS, TOTALLY DISREGARDING THE OWNERS OF THE TERRITORY.

WHETHER EUROPE, AND ESPECIALLY THE ADMINISTERING POWER, WERE WRONG IN REGARDING THAT TERRITORY AS A TERRA NULLIUS WHEN IN FACT IT HAD A POLITICO-JURIDICAL ORGANIZATION OF WHICH MANY PROOFS HAVE BEEN GIVEN, BOTH BY MAURITANIA AND MOROCCO, IS QUITE ANOTHER QUESTION, WHICH IS IN FACT, UNFORTUNATELY, NOT PUT TO THE COURT. THE QUESTION PUT TO THE COURT IS WHETHER AT THE TIME OF COLONI-
ZATION, AND THUS WITHIN THE CONTEXT OF THE COLONIALIST LAW OF THE PERIOD, THE SAHARA WAS NULLIUS, AND NOT WHETHER THE COLONIAL POWERS COMMITTED, AS IS CLEAR TO SEE, AN ERROR AND EVEN A CRIME IN CONSIDERING IT TO BE SUCH.
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IT IS THEREFORE NECESSARY TO REALIZE CLEARLY THAT THAT WAS THE SITUATION. WHEN THE GREAT HOVA DYNASTY-AS I RECALLED EARLIER-SUCCUMBED UNDER THE BLOWS OF COLONIALISM AT THE END OF THE 19TH CENTURY, WHEN IT HAD OVER A VERY LONG PERIOD GIVEN MADAGASCAR A STATE WITH THE SOUNDEST OF POLITICAL, LEGAL AND ADMINISTRATIVE TRADITIONS, JURISTS, AS I HAVE ALREADY SAID, NEVERTHELESS CONSIDERED THAT GREAT COUNTRY TO BE TERRA NULLIUS. THAT FLAGRANT INJUSTICE, CLEARLY INSPIRED BY THE DESIRE FOR CONQUEST, AROSE FROM THE FACT THAT THE HOVA MONARCHY WAS NEITHER RECOGNIZED, NOR SPONSORED BY, NOR INCLUDED IN THE CLOSED CLUB OF THE EUROPEAN STATES WHO HAD RESTRICTED THE INTERNATIONAL COMMUNITY OF THE LAW OF NATIONS TO THE MEMBERS OF THAT CLUB. THAT COMMUNITY OF CIVILIZED STATES HAD BEEN UNILATERALLY DEFINED BY THEM, FOR THE PURPOSES OF THEIR RELATIONS WITH EACH OTHER AND WITH REGARD TO OTHERS-I NEARLY SAID AGAINST OTHERS.

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PROFESSOR DUDLEY FIELD ONCE WROTE THAT THE SIMPLE IDEA THAT NO COMMUNITY HAD THE RIGHT TO EXCLUDE OR EXTERMINATE THE OTHERS HAD TAKE
N
TIME TO MAKE HEADWAY.
"WE ARE NOT YET SUFFICIENTLY IMBUED WITH THE IDEA THAT WHAT WE CALL THE LAW OF NATIONS IS AFTER ALL MERELY A SET OF LEGAL RULES, DRAWN UP BY CHRISTIANITY ... FOR CHRISTIAN PEOPLES, WHICH HAS NO AUTHORITY OVER THE GREATER PART OF THE WORLD ".
(DUDLEY FIELD, REVUE DE DROIT INTERNATIONAL ET DE LEGISLATION COMPAREE, 1875, P. 659.)
MOREOVER, AS THE LEGAL THEORY OF THE 19TH CENTURY SAW IT:
"..... EUROPEAN CUSTOMARY INTERNATIONAL LAW IS NOT APPLICABLE TO RELATIONS BETWEEN CIVILIZED STATES AND BARBARIANS, AS IT IS A PRODUCT OF CIVILIZATION AND OF SHARED MORAL AND POLITICAL CONCEPTS.

BARBARIANS HAVE NO NOTION OF THE DUTIES ENTAILED IN CIVILIZATION.
HENCE THEY CANNOT BENEFIT FROM THE RIGHTS WHICH ARE THE COUNTERPART
OF THOSE DUTIES. AT BOTTOM, THEY BELIEVE ONLY IN FORCE'
(F. DE MARTENS, "LA RUSSIE ET L'ANGLETERRE DANS L'ASIE CENTRALE",
REVUE DE DROIT INTERNATIONAL, VOL. XI, 1879, PP. 227-301).
THERE YOU HAVE ALL NON-EUROPEAN PEOPLES DULY DESPATCHED WITH A
SYLLOGISM WHICH IS AS DERISORY AS IT IS STRICT. LATER THE SAME
WRITER ADDS:

"ABOUT AS FAR AS ONE COULD GO WOULD BE TO RECEIVE THE LARGE
STATES OF ASIA INTO THE COMMUNITY OF INTERNATIONAL LAW, AND EVEN
THEN IT WOULD BE NECESSARY TO TAKE PRECAUTIONS AGAINST THEM BY
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ENSURING THAT ANY EUROPEAN COLONIES WITHIN THEIR BORDERS HAVE
EXTRA-TERRITORIAL STATUS". (IBID.)

IN SUCH A CONTEXT - AND HOW COULD WE CHANGE CONTEXT, SINCE WE
ARE
POSITIONED AT THE TIME OF COLONIZATION AND REFERRING TO THE DOMINANT
COLONIAL INTERNATIONAL LAW OF THAT AGE ? - THERE IS NOTHING TO BE GOT
OUT OF THE FIRST QUESTION SUBMITTED TO THE COURT. IN SUCH A
SITUATION,
ONE HAS TO REALIZE, FACED WITH THIS DEVASTATING CONCEPT OF TERRA
NULLIUS AS UNDERSTOOD AT THE TIME OF THE COLONIZATION OF THE SAHARA,
THAT MAURITANIA ITSELF, WHICH WAS ON THE POINT OF UNDERGOING
COLONIZATION, WAS CONSIDERED AS TERRA NULLIUS, AND THAT MOROCCO
ITSELF WAS ON THE BRINK OF DISMEMBERMENT.
THAT WAS THE EUROPEAN LAW OF THE BERLIN CONFERENCE AND OF THE
SECRET AGREEMENTS, THAT WAS THE LAW OF THE TERRITORIAL QUID PRO QUO
AND UNDERCOVER CONFLICTS.

NOW IT IS PLAIN TO SEE HOW ARTIFICIAL, HOW DERISORY, ON THE ONE
HAND, A QUESTION UNDERSTOOD IN SUCH TERMS MUST BE, AND ON THE
OTHER HAND HOW STERILE MUST BE THE ONLY ANSWER THAT THIS QUESTION
COULD POSSIBLY CALL FOR, IN THIS CONTEXT, IN THIS EUROPEAN LAW OF
THE 19TH CENTURY.

SO WHAT IS TO BE DONE?

OBVIOUSLY, IT WAS NOT AT THIS UNPALATABLE SOLUTION THAT THE
COUNTRIES CONCERNED HOPED TO ARRIVE. THE GENERAL ASSEMBLY DID NOT
BRING THIS MATTER TO THE COURT TO RECEIVE SUCH A REPLY, WHICH FOR
A LONG TIME WAS THAT OF THE COLONIAL POWERS. SINCE THIS LINE OF
REASONING IS UNACCEPTABLE, WE MUST LOOK FOR ANOTHER WAY, AND IT
SEEMS TO US THAT TWO OTHER APPROACHES
TO THE PROBLEM SHOULD BE CONSIDERED. THE FIRST IS TO REJECT
COLONIALIST LAW AND TO REFER TO THE LEGAL SYSTEM PROPER TO THOSE
TERRITORIES, A SYSTEM WHICH EXISTED AT THE TIME BUT WAS SWAMPED
BY EUROPEAN LEGAL IMPERIALISM. THE SECOND IS TO HAVE RECOURSE TO THE
PRINCIPLES
DEVELOPED BY INTERNATIONAL LAW. LET US SUCCESSIVELY CONSIDER THESE
TWO POSSIBLE WAYS, AND FIRST OF ALL THE CONFLICT OF LEGAL SYSTEMS.

THE ANALYSIS PERFORMED BY EUROPEAN JURISTS OF THE CONCEPT OF
TERRA NULLIUS AND THE WAY IN WHICH IT WAS APPLIED IN THE SAHARA
HAS ALWASY BEEN REJECTED BY THE MAGHREBINE GOVERNMENTS, AND ITS
IS SURELY REJECTED TODAY BY THE MAJORITY OF STATES. ANY ATTENTIVE

JURIST WITH RESPECT FOR LOCAL SOCIETIES WILL AGREE THAT THE
INTRODUCTION OF EUROPEAN LAW INTO NORTH AFRICA AND THE SAHARA
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DID NOT TAKE PLACE ON VIRGIN SOIL. THERE EXISTED AT THAT TIME
AN ARAB POLITICAL AND ADMINISTRATIVE ORGANIZATION OF SPACE IN
ACCORDANCE WITH PERFECTLY PRECISE AND KNOWN RULES; BEFORE COLON-
IZATION, THE ISLAMIC PUBLIC-LAW DIMENSION WAS JUST AS DEVELOPED
AS ITS PRIVATE-LAW DIMENSION, AND IT IS WELL KNOWN THAT THE
CONSTRUCTION OF THE MUSLIM CIVITAS (DAR EL-ISLAM) HAD REACHED
NO LESS A DEGREE OF PERFECTION THAN THE WESTERN STATE AND THE
SO-CALLED CIVILIZED WORLD.
COLONIZATION SHORTCIRCUITED ALL THAT ASPECT OF ARABO-ISLAMIC
CIVILIZATION; IT CONFINED ISLAMIC LAW TO DOMAIN OF PRIVATE LAWS
AND SUBSTITUTED ITS OWN PUBLIC LAW, AS WELL AS THE INTERNATIONAL
LAW ELABORATED BY EUROPE, FOR THE PRE-EXISTING SOCIO-LEGAL
SYSTEM WHICH WAS SYSTEMATICALLY IGNORED OR FLOUTED. BUT THE
FACT REMAINED THAT WHERE THE COLONIZER DID NOT WISHTO FIND ANYTHING
THERE ALREADY EXISTED A COMPLETE ORGANIZATION WHICH ENABLES ONE
TO STATE MOST FIRMLY THAT THE TERRITORY OF THE SAHARA DID NOT
BELONG TO NO-ONE.
IT IS THUS POSSIBLE TO REPLY ON THE BASIS OF SUCH REASONING
TO THE FIRST QUESTION WHICH HAS BEEN SUBMITTED TO YOU, TO REPLY
THEREFORE IN ACCORDANCE WITH IRREFUTABLE LOGIC IN RELIANCE ON
UNDENIABLE HISTORICAL AND SOCIAL FACTS.
THE REPLY COULD THEREFORE BE FRAMED AS FOLLOWS: "NO, THE
SAHARA WAS NOT A TERRITORY BELONGING TO NO-ONE, BECAUSE IT
BELONGED TO THE DAR EL-ISLAM." IN MAKING USE OF SUCH AN APPROACH
NOT ONLY WOULD YOUR EMINENT TRIBUNAL CONSENT TO ACKNOWLEDGE THAT
IT IS THE HIGH COURT OF ALL NATIONS AND ALL LEGAL SYSTEMS, WHICH
SHOULD CO-EXIST ON THIS EARTH IN FRIENDLY UNDERSTANDING, BUT
IT WOULD ALSO BE RENDERING JUSTICE TO ALL THE SOCIETIES THAT
HAVE BEEN TRAMPLED ON BY COLONIZATION.
BUT CAN THE COURT REALLY PROCEED IN THIS WAY, WHEN IN THE
19TH CENTURY IT WAS NOT THE LAW OF THE MUSLIM CIVITAS WHICH PREVAILED
IN THE EYES OF THE COLONIZING STATES OF EUROPE, BUT THEIR
INTERNATIONAL LAW?
THAT APPROACH, WHICH LEADS EASILY IN THE CASE OF THE FIRST
QUESTION TO AN ANSWER WHICH IS HISTORICALLY JUST AND FAIR, ALSO
LEADS ALONG THE SAME PATH TO AN ANSWER TO THE SECOND QUESTION,
FOR IF ONE ADOPTS THE LOGIC OF THE ARABO-MUSLIM SYSTEM TO REJECT
THE DESCRIPTION OF A TERRITORY OWNED BY NO-ONE, IT IS DIFFICULT
UNDER THE SAME SYSTEM AT THE SAME PERIOD TO HAVE RECOURSE IN
RESPECT OF THOSE TERRITORIES TO THE CONCEPT OF A STATE; THAT
IS A CONCEPT IMPORTED FROM EUROPE AND WHICH AT THAT TIME HAD
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NOT FOUND ITS WAY TO THE SAHARA. DAR EL-ISLAM IS IN FACT A
GEOGRAPHIC AREA WHICH IS NOT NECESSARILY ORGANIZED IN A HOMOGENEOUS
FASHION. IT MAY WELL CONTAIN IN SOMEPARTICULAR PLACE-AND THAT WAS

INDEED THE CASE-A MUSLIM CITY ENDOWED WITH AN ADMINISTRATIVE
ORGANIZATION AND EVEN DEFINED BY FRONTIERS WHICH MAY RECALL
A STATE OF THE EUROPEAN TYPE-I AM THINKING OF MOROCCO-BUT
NEARBY THERE MAY ALSO BE A TERRITORY ORGANIZED DIFFERENTLY,
WITHOUT A CENTRAL POWER, BUT A TERRITORY.

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HAVING EXTERNAL RELATIONS, REFERRING TO EXTERNAL RELIGIOUS
AUTHORITIES, AND INDISPUTABLY PART OF THE SAME DAR EL-ISLAM. WE
ARE HERE IN THE PRESENCE OF DIFFERENT LEGAL CONCEPTS, WHICH CANNOT
BE REDUCED TO THOSE OF EUROPEAN SYSTEMS OF LAW AND ARE OFTEN MIS-
UNDERSTOOD AND WRONGLY INTERPRETED.
BUT, AS I POINTED OUT EARLIER, THE PROBLEM, AT LEAST IN THE
CASE OF THE FIRST QUESTION, IF NOT FOR BOTH QUESTIONS SUBMITTED
TO THE COURT, IS NOT A PROBLEM OF A CONFLICT BETWEEN DIFFERENT
LEGAL SYSTEMS IN THE SAME PERIOD, THAT IS TO SAY A CONFLICT
BETWEEN EUROPEAN INTERNATIONAL LAW AND ISLAMIC INTERNATIONAL LAW.
IF ONE TAKES THE STANDPOINT OF THE EUROPEAN COLONIZING STATES-
AND ONE CANNOT AVOID DOING SO SINCE IT WAS THEY WHO APPLIED THE
CONCEPT OF TERRA NULLIUS IN THE 19TH CENTURY, IN ACCORDANCE
WITH THE RULES WHICH GOVERNED THEM-ONE CANNOT BUT ASSUME THE
PREDOMINANCE, IN THOSE DAYS, OF THE INTERNATIONAL LAW OF THE SO-
CALLED ADVANCED EUROPEAN NATIONS OVER EVERY OTHER SYSTEM OF LAW.
IT WAS THE 19TH CENTURY*
THERE REMAINS THEREFORE ONLY ONE OTHER WAY IN WHICH TO REPLY
SATISFACTORILY TO THE TWO QUESTIONS SUBMITTED TO THE COURT: THAT
IS TO HAVE RECOURSE TO INTERTEMPORAL LAW.
IN SPITE OF THE CHARACTER OF THE QUESTION PUT BY THE GENERAL
ASSEMBLY AND INTERPRETED WITHIN THE CONTEXT OF THE PERIOD, THE
COURT COULD NEVERTHELESS, IN ITS JUDICIAL FUNCTION, SEEK TO GIVE
THE MOST USEFUL SENSE BOTH TO THE QUESTION PUT AND TO SUCH
OPINION AS IT MAY DELIVER. IT IS CERTAINLY PERFECTLY WELL ESTABLI-
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SHED, AND IN ACCORDANCE WITH THE JURISPRUDENCE, THAT THE COURT CANNOT ALTER THE WORDING OF A QUESTION PUT TO IT IN A REQUEST FOR AN OPINION. IT DOES NOT LIE WITHIN THE NORMAL POWERS OF THE COURT, AND STILL LESS WITHIN THE POSSIBILITIES OF STATE WHICH IS A PARTY TO THE PROCEEDINGS, TO MODIFY THE CONTENT OF THE QUESTION BY THE DEVICE, FOR EXAMPLE, OF A COUNTERCLAIM.

BUT, ON THE OTHER HAND, IT APPEARS TO US TO BE IMPERATIVE AND OBVIOUS THAT, IN ORDER TO CARRY OUT ITS TASK CORRECTLY AND FULFIL ITS JUDICIAL FUNCTION, THE COURT IN CONSIDERING A QUESTION SHOULD GIVE IT THE MOST USEFUL SENSE AND IN RENDERING ITS ADVISORY OPINION SHOULD DO ITS BEST TO ENDEAVOUR TO ASSIST THE UNITED NATIONS BODY WHICH REQUESTED IT. THE COURT WOULD THEREFORE APPEAR, IN MY HUMBLE OPINION, TO BE FULLY JUSTIFIED IN GIVING AN INTERPRETATION OF THE QUESTION IN THE LIGHT OF THE PRESENT PREOCCUPATIONS OF THE GENERAL ASSEMBLY. THE LATTER, AT THE TIME WHEN IT SEIZED THE COURT OF ITS REQUEST FOR AN OPINION, WAS ENGAGED IN INITIATING THE PROCESS OF DECOLONIZATION OF THE TERRITORY BY RECOURSE TO CONSULTATION OF THE POPULATION OF WESTERN SAHARA.

THESE OBSERVATIONS LED TO THE CONCLUSION THAT THE QUESTIONS PUT TO THE COURT MUST NECESSARILY BE CONSIDERED, NOT IN ISOLATION, BUT IN THEIR CONTEXT, THAT IS TO SAY IN RELATION TO THE GROUNDS EXPRESSED IN RESOLUTION 3292 (XXIX) BY THE GENERAL ASSEMBLY. THE IMPORTANCE OF THE GROUNDS EXPRESSED IN THE PREAMBLE TO INTERNATIONAL LEGAL DOCUMENTS IS CONSIDERABLE, AND HAS BEEN EMPHASIZED BY SEVERAL AUTHORITIES, AS YOU KNOW, IN RECENT WORKS.

IT IS CLEAR, IN THIS CASE, THAT IF THE GENERAL ASSEMBLY WAS CONCERNED TO OBTAIN AN ADVISORY OPINION ON THE LEGAL DIFFICULTY WHICH AROSE DURING THE DISCUSSIONS AS TO THE STATUS OF THE TERRITORY AT THE TIME OF ITS COLONIZATION BY SPAIN, AND EVEN IT IT EXPRESSED ITS DESIRE TO OBTAIN THIS OPINION ON CERTAIN LEGAL ASPECTS OF THIS PROBLEM, THE COURT IS FACED, NOT WITH A CASE INVOLVING OLD TITLES AND THE ASSESSMENT OF THEIR VALIDITY, BUT WITH A PROBLEM RESULTING FROM THE IMPLEMENTATION OF RESOLUTION 1514 (XV) CONTAINING THE DECLARATION ON THE GRANTING OF INDEPENDENCE TO COLONIAL COUNTRIES AND PEOPLES-SUCH BEING ITS TITLE. RESOLUTION 3292 (XXIX) STATES EXPLICITLY THAT "THE PERSISTENCE OF A COLONIAL SITUATION IN WESTERN SAHARA JEOPARDIZES STABILITY AND HARMONY IN THE NORTH-WEST AFRICAN REGION". IN THE OPERATIVE PART ITSELF, THE REQUEST FOR OPINION IS FORMULATED "WITHOUT PREJUDICE TO THE APPLICATION OF THE PRINCIPLES EMBODIED

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IN GENERAL ASSEMBLY RESOLUTION 1514 (XV)". IT SHOULD ALSO BE NOTED THAT THE ASSEMBLY THOUGHT IT NECESSARY TO REAFFIRM "THE RIGHT OF THE POPULATION OF THE SPANISH SAHARA TO SELF-DETERMINATION IN ACCORDANCE WITH RESOLUTION 1514 (XV)".

IT IS THEREFORE APPARENT THAT, IF ONE CONSIDERS AT THE SAME TIME THE PREAMBLE AND THE OPERATIVE PART OF RESOLUTION 3292/ XXIX), THE REQUEST FOR AN OPINION WAS MADE IN CONNECTION WITH THE

APPLICATION TO A CONCRETE CASE OF THE RULES FOR DECOLONIZATION LAID DOWN FIFTEEN YEARS AGO BY THE GENERAL ASSEMBLY. IT MUST BE NOTED, HOWEVER, THAT, EVEN IN THEIR OWN TERMS, THE QUESTIONS PUT TO THE COURT ARE MEANINGLESS EXCEPT IN RELATION TO A SYSTEM OF LAW RELATING TO THE OCCUPATION OF TERRITORIES, WHICH WAS WORKED OUT DURING THE PERIOD OF COLONIAL EXPANSION BY EUROPEAN COUNTRIES. THUS THE CHRONOLOGICAL SUCCESSION OF LEGAL RULES WHICH APPEARS IN THE ACTUAL TERMS OF RESOLUTION 3292 (XXIX) IS THE LEGAL EXPRESSION OF A FUNDAMENTAL POLITICAL AND SOCIAL TRANSFORMATION. THAT BEING SO, IT WOULD BE INCONCEIVABLE IF THE REPLY GIVEN BY THE COURT TO THE QUESTIONS PUT TO IT WERE TO NEGLECT THE INTERTEMPORAL PROBLEM REVEALED BY THE REASONS FOR WHICH AN OPINION WAS REQUESTED.

THE DECOLONIZATION POLICY OF THE UNITED NATIONS HAS LED TO PRINCIPLES TENDING TO ESTABLISH POLITICAL STATUS ON THE BASIS OF THE SELF-DETERMINATION OF THE PEOPLES. RESOLUTION 1514 (XV), WHICH, FROM THIS POINT OF VIEW, IS A FUNDAMENTAL DOCUMENT (TO WHICH RESOLUTION 3292 (XXIX) REFERS ON THREE OCCASIONS) ESTABLISHED THE PRINCIPLES FOR THE TERRITORIAL CHANGE. THIS RESOLUTION 1514 SPEAKS OF THE DUTY OF THE COLONIAL POWER TO CARRY OUT THE TRANSFER, THE DUTY TO RESPECT THE FREELY-EXPRESSED WILL AND DESIRE OF THE PEOPLE OF THE TERRITORY, THE RIGHT TO COMPLETE INDEPENDENCE AND THE RIGHT TO TERRITORIAL INTEGRITY.

THIS TEXT, WHICH IS TRULY REVOLUTIONARY WHEN COMPARED WITH THE TRADITIONAL LEGAL PRINCIPLES OF THE 19TH CENTURY AS TO TRANSFERS OF TERRITORY, CONTAINS NO OTHER LIMITS THAN "THE WILL AND DESIRE OF THE PEOPLE". ONE MUST STRESS, AS WILL BE DONE LATER, PARAGRAPH 3 OF THIS RESOLUTION 1514 (XV), WHICH PROVIDES THAT:
"INADEQUACY OF POLITICAL, ECONOMIC, SOCIAL OR EDUCATIONAL PREPAREDNESS SHOULD NEVER SERVE AS A PRETEXT FOR DELAYING INDEPENDENCE."

THIS SHOWS THE CONCERN TO ALLOW THE WILL OF THE PEOPLE TO PRODUCE ALL THE EFFECTS IT WISHES, WITHOUT EXCLUDING ANY.

IN CONTEMPORARY LAW, THE RIGHT TO SELF-DETERMINATION THEREFORE
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FULFILS A FUNCTION WHICH IS EXACTLY OPPOSITE TO THAT OF THE TERRA NULLIUS THEORY.

FOR ONE MUST REMEMBER THE HISTORIC FUNCTION-IF I MAY RETURN TO THIS FOR A MOMENT-PLAYED BY THE CONCEPT OF TERRA NULLIUS. IT DISREGARDED THE RIGHT OF PEOPLES, ENABLING THEM TO BE ENSLAVED, EMPRISONING THEM FOR CENTURIES IN A STERN DIALECTICAL PARENTHESIS. SO OBSOLETE A THEORY CANNOT PROPERLY BE RELIED ON IN 1975 AND, WHAT IS MORE, IN THE CONTEXT OF THE DECOLONIZATION OF THESE PRESENT TIMES IN WHICH-TO USE THE BEAUTIFUL IMAGE OF THE ORIENTALIST JACQUES BERQUE-EACH PEOPLE IS SEEKING TO PICK UP ITS OWN HEAVEN AND EARTH. THE PEOPLES ARE NOW FREEING THEMSELVES FROM THE PARENTHESIS IN WHICH THE THEORY OF TERRA NULLIUS HAS HELD THEM CAPTIVE. THIS IS A FACT. TO PASS FROM SERVITUDE TO FREEDOM, ONE MUST PASS FROM THE THEORY OF A TERRITORY BELONGING TO NO-ONE TO ANOTHER THEORY, THE EFFECTS OF WHICH ARE REVERSE OF THOSE OF THE FIRST, WHICH IS NOW IRREMEDIABLY OUT OF DATE. THIS OTHER

THEORY HAS BEEN FORGED BY THE INTERNATIONAL COMMUNITY: IT IS THE RIGHT OF PEOPLES TO GENUINE SELF-DETERMINATION. THE THEORY OF TERRA NULLIUS CONSTITUTED, FOR THE PERIOD BEFORE AND UP TO THE 19TH CENTURY, EXACTLY WHAT THE RIGHT OF PEOPLES TO SELF-DETERMINATION CONSTITUTES FOR MODERN INTERNATIONAL LAW AND PRESENT-DAY INTER-NATIONAL RELATIONS.

IF THE THEORY OF TERRA NULLIUS OBLITERATED PEOPLES, ONE OF THE FUNDAMENTAL CONDITIONS WHICH MUST NECESSARILY BE SATISFIED BY ANY

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OTHER CONTRARY THEORY IN TAKING OVER FROM THE FIRST, AND IN PERFORMING A NEW FUNCTION IN ACCORDANCE WITH PRESENT-DAY ETHICO-SOCIAL FACTS, MUST BE THE LIBERATION OF SUBJUGATED PEOPLES. THE THEORY OF TERRA NULLIUS, MANY TIMES RE-WORKED AND NEVER ENTIRELY FREED FROM ITS SERIOUS AMBIGUITIES,REPRESENTED THE MOST OBVIOUS AND THE MOST CATEGORICAL DENIAL OF THE EXISTENCE OF PEOPLES AND, THAT BEING SO, ONLY SELF-DETERMINATION CAN APPEAR AS THE RULE WHICH IS EXACTLY THE ANTIDOTE OF THE FIRST. THE COURT CAN THE LESS AFFORD
TO IGNORE THE RIGHT OF PEOPLES TO SELF-DETERMINATION BECAUSE THE GENERAL ASSEMBLY HAS REQUESTED ITS OPINION PRECISELY IN THIS CONTEXT AND, IN ADDITION, THIS LAW APPERTAINS, AS WILL BE SEEN LATER, TO JUS COGENS.

SUCH AN APPROACH TO THE PROBLEM APPEARS FULLY JUSTIFIED TO ME IF ONE REFERS TO INTERTEMPORAL LAW. IN THE AWARD HE GAVE IN THE CASE OF THE ISLAND OF PALMAS, MAX HUBER, WHOM I QUOTED JUST NOW, AFTER HAVING EXAMINED A LEGAL NORM IN THE CONTEXT OF THE TIME IN WHICH IT WAS APPLIED, VERY CORRECTLY POINTED OUT THAT SUCH A NORM COULD NOT BE APPLIED AT PRESENT TIME WITHOUT SOME PREVIOUS ADAPTATION, OR MORE EXACTLY:

"THE SAME PRINCIPLE WHICH SUBJECTS THE ACT CREATIVE OF A RIGHT TO THE LAW IN FORCE AT THE TIME THE RIGHT ARISES, DEMANDS THAT THE EXISTENCE OF A RIGHT, IN OTHER WORDS ITS CONTINUED MANIFESTATION SHALL FOLLOW THE CONDITIONS REQUIRED BY THE

EVOLUTION OF LAW." (UNRIAA II, P.845.)
IT WAS IN THE SAME CONTEXT AND IN THE SAME SPIRIT THAT THE
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COURT GAVE ITS ADVISORY OPINION IN THE CASE OF NAMIBIA. I QUOTE:
"MINDFUL AS IT IS OF THE PRIMARY NECESSITYOF INTERPRETING
AN INSTRUMENT IN ACCORDANCE WITHTHE INTENTIONS OF THE PARTIES
AT THE TIME OF ITS CONCLUSION, THE COURT IS BOUND TO TAKE INTO
ACCUNT THE FACT THAT THE CONCEPTS EMBODIED IN ARTICLE 22 OF THE
COVENANT-*THE STRENUOUS CONDITIONS OF THE MODERN WORLD* AND
THE WELL BEING AND DEVELOPMENT OF THE PEOPLES CONCERNED-
WERE NOT STATIC, BUT WERE BY DEFINITION EVOLUTIONARY, AS ALSO,
THERFORE, WAS THE CONCEPT OF THE *SACRED TRUST*. THE PARTIES
TO THE CONVENANT MUST CONSEQUENTLY BE DEEMED TO HAVE ACCEPTED
THEM AS SUCH. THAT IS WHY, VIEWING THE INSTITUTIONS OF 1919,
THE COURT MUST TAKE INTO CONSIDERATION THE CHANGES WHICH HAVE
OCCURRED IN THE SUPERVENING HALF-CENTURY, AND ITS INTERPRETATION
CANNOT REMAIN UNAFFECTED BY THE SUBSEQUENT DEVELOPMENT OF LAW,
THROUGH THE CHARTER OF THE UNITED NATIONS AND BY WAY OF
CUSTOMARY LAW. MOREOVER, AN INTERNATIONAL INSTRUMENT HAS TO
BE INTERPRETED AND APPLIED WITHIN THE FRAMEWORK OF THE ENTIRE
LEGAL SYSTEM PREVAILING AT THE TIME OF THE INTERPRETATION.
IN THEDOMAIN TO WHICH THE PRESENT PROCEEDINGS RELATE, THE LAST
FIFTY YEARS, AS INDICATED ABOVE, HAVE BROUGHT IMPORTANT
DEVELOPMENTS. THESE DEVELOPMENTS LEAVE LITTLE DOUBT THAT THE
ULTIMATE OBJECTIVE OF THE SACRED TRUST WAS THE SELF-DETERMINATION
AND INDEPENDENCE OF THE PEOPLES CONCERNED. IN THIS DOMAIN, AS
ELSEWHATERE, THE CORPUS IURIS GENTIUM HAS BEEN CONSIDERABLY
ENRICHED, AND THIS THE COURT, IF IT IS FAITHFULLY TO DISCHARGE
ITS FUNCTIONS, MAY NOT IGNORE." (SEE LEGAL CONSEQUENCES FOR
STATES OF THE CONTINUED PRESENCE OF SOUTH AFRICA IN NAMIBIA
(SOUTH WEST AFRICA) NOTWITHSTANDING SECURITY COUNCIL
RESOLUTION 276 (1970), ADVISORY OPINION, I.C.J. REPORTS 1971,
PP. 31 F.)
IN THE PRESENT CASE, HOWEVER, WE ARE CONCERNED LESS WITH
ADAPTATION THAN WITH THE SUBSTITUTION OF AN EXACTLY CONTRARY NORM.
THIS SUBSTITUTION IS MORE THAN LEGITIMATE, SEEING THAT THE RIGHT OF
PEOPLES TO SELF-DETERMINATION BELONGS TO JUS COGENS AND IS THERE-
FORE, ONTHE ONE HAND, SUPERIOR TO ANY OTHER LEGALNORM AND, ON
THE OTHER, EXPRESSES AN IRREDUCIBILITY IN PRINCIPLE TO THE SYSTEM
OF OCCUPATION OF INHABITED TERRITORIES, IN OTHER WORDS EXPRESSES
A FUNDAMENTAL INCOMPATIBILITY WITH THE THEORY OF TERRA NULLIUS.
THE HISTORICAL PHASE WE ARE LIVING THROUGH TODAY IS REPRESENTED
BY THE AGONIZING REAPPRAISAL OF THIS UNIVERSE WHICH FOR CENTURIES HAS
BEEN DIVIDED INTO A FEW CAPTORS AND A MULTITUDE OF CAPTIVES.
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THE THEORY OF TERRA NULLIUS WHICH SO CONVENIENTLY DISREGARDED
PEOPLES BY IMPRISONING THEM IN A DREADFUL DIALECTICAL PARENTHESIS,
THIS THEORY, BASED ON THE OPPORTUNE DENIAL OF THEIR EXISTENCE

EVEN WHILE THEY STUBBORNLY ASSERTED IT, THIS THEORY, WHICH TO
ACHIEVE THESE ENDS WAS MADE TO PRODUCE A WHOLE RANGE OF OSTEN-
SIBLE BUT ARTICIFICAL LEGITIMACIES, IS BEING ROCKED TO ITS
FOUNDATIONS. THOSE SAME PEOPLES WHO WERE ONCE HOPELESSLY ENMESHED
IN THE SYSTEMOF TERRA NULLIUS ARE FREEING THEMSELVES THROUGH
SELF-DETERMINATION. THE OUTLINES OF A GRADUAL DEMOCRATIZATION
OF INTERNATIONAL RELATIONS CAN NOW BE GLIMPSED. AN "INTERNATIONAL
LAW OF PARTICIPATION", TO USE RICHARD FALK'S EXPRESSION, IS
IN THE GESTATIONSTAGE. FOLLOWING THE HIGH TIDE OF TERRA
NULLIUS, WE ARE NOW WITNESSING ITS FINAL EBB.

THUS IT IS IN THE CONTEXT OF THE RIGHT OF THE
POPULATION OF WESTERN SAHARA TO EXERCISE GENUINE SELF-DETERMINATION
THAT THE QUESTIONS PUT TO THE COURT ARE TO BE GIVEN THE MOST
CORRECT INTERPRETATION, AND THE ONE MOST USEFUL TO THE GENERAL
ASSEMBLY. ANY OTHE APPROACH WOULD BE BOUND TO CONFLICT WITH JUS
COGENS AND WITH A RIGHT WHICH TODAY REPRESENTS A KIND OF
PRERQUISITE, THAT IS TO SAY, A PRIMARY RULE OR BASIC NORM OF
CONTEMPORARY INTERNATIONAL LAW FROM WHICH THE CONSTRUCTION OF
THE WHOLE EDIFICE OF THE INTERNATIONAL COMMUNITYOF OUR TIME-
I.E., A SOCIETY WHICH IS NO LONGER A CLOSED CLUB BUT AN OPEN
SOCIETY- FLOWS: IT IS INDEED ON THE BASIS OF THE
RIGHT OF PEOPLES TO SELF-DETERMINATION THAT THIS COMMUNITY HAS
BEEN CONSIDERABLY ENLARGED AND ENRICHED. (JOHN WESTLAKE HAS
OBSERVED THAT DECOLONIZATION HAS TRANSFORMED AND ENLARGED "THE
GEOGRAPHY OF INTERNATIONAL LAW".)

SELF-DETERMINATION HAS BECOME A PRIMARY RULE WHICH GOVERNS ALL
THE OTHERS. IT HAS BECOME, IN SUM, A POINT OF DEPARTURE FOR THE
CONSTITUTION OF A MORE OPEN AND MORE UNIVERSAL COMMUNITY OF NATIONS
WHOSE RULES OF CONDUCT FLOW FROM THE PRIMARY RULE OF SELF-
DETERMINATION AND MAY NOT BE CONCOMPATIBLE WITH IT.

IN THAT SENSE, OUR AGE IS RADICALLY DIFFERENT FROMTHE ONE IN
WHICH THE TRIUMPHANT TERRA NULLIUS THEORY JUSTIFIED THE ENSLAVE-
MENT OF PEOPLES AND CONVERSELY SERVED AS THE PRIMARY RULE FOR
THE CREATION OF A CLOSED COMMUNITY RUN BY THE EUROPEAN CLUB.
STATES CAME INTO BEING ONLY BY THE WILL OF THE CONCERT OF EUROPEAN
STATES ANDONLY UNDERTHE CONDITIONS IMPOSED BY IT. THUS IN 1878
BISMARCK DECLAREDAFTER THE BERLIN CONFERENCE THAT "ONLY EUROPE
HS THE RIGHT TO SANCTION INDEPENDENCE; IT OUGHT THEREFORE TO ASK
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ITSELF ONWHAT CONDITIONS IT WILL TAKE THAT IMPORTANT DECISION".
IN SUM, THE BIRTHCERTIFICATE OF EVERY STATE WAS THUS ISSUED
EXCLUSIVELY BY EUROPE.

THROUGHOUT THE AGE WHEN THE EUROPEAN CLUB RAN THE AFFAIRS OF
THE WORLD, THE COLONIAL DEPENDENCIES WERE IN NO WAY PROTECTED BY
INTERNATIONAL LAW. BY INTERNATIONAL LAW, MR PRESIDENT, AS YOU
WILL HAVE REALIZED THROUGHOUT MY ARGUMENT, I MEAN THE COMPLEX OF
EUROPEAN CUSTOMARY NORMS WHICH DOMINATED THE WORLD FOR FOUR
CENTURIES AND ECLISPED OTHER SYSTEMS. (IN INDIA, INTERNATIONAL
LAW, OR DESHA DHARMA IN SANSCRIT, DATED BACK TO 4,000 YEARS
B.C., THE AGE OF VEDAS.) IMPERIALIST AND INEGALITARIAN AS IT WAS
CORRESPONDING TO A PARTICULAR TYPE OF ORGANIZATION OF THE WORLD,

THE INTERNATINAL LAW TO WHICH I REFERWAS MOREOVER ONLY INTERNATIONAL
IN NAME. GRADUALLY ELABORATED OVER FOUR CENTURIES BY AND FOR
EUROPE, APPLICABLE SOLELY TO EUROPEAN COUNTRIES, TO THE EXCLUSION
OF COLONIES, PROTECTORATES AND SO-CALLED UNCIVILIZED COUNTRIES,
IT WAS A LAW OF THE EUROPEAN FAMILY, INSPIRED BY EUROPEAN VALUES,
THE EXPRESSION OF AN AGE, THE EXPRESSION OF A CERTAIN HEGEMONY
AND OF A COMPLEX OF ECONOMIC AND OTHER INTERESTS.
MR PRESIDENT, I FEEL THAT IT IS GETTING LATE AND PERHAPS IT
MAY PLEASEYOU, PERHAPS IT MAY PLEASE THE COURT, TO SUSPEND THE
SITTING AT THIS POINT. I AM AT YOUR DISPOSAL, AT ALL EVENTS.
UNQUOTE.
TANGUY

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